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VOLUME 423

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1975

(BEGINNING OF TERM)

OCTOBER 6, 1975, THROUGH JANUARY 26, 1976

TOGETHER WITH IN-VACATION DISMISSALS AND OPINIONS
OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS*

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.[1]
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.[2]

RETIRED

STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

EDWARD H. LEVI, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

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*For notes see p. IV.

NOTES

[1] MR. JUSTICE DOUGLAS retired on November 12, 1975. See also *post*, p. VII.

[2] THE HONORABLE JOHN PAUL STEVENS, of Illinois, was nominated by President Ford on November 28, 1975, to be an Associate Justice of this Court; the nomination was confirmed by the Senate on December 17, 1975; he was commissioned on the same date; and he took the oath and his seat on December 19, 1975. See also *post*, p. XI.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.*

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)
(For next subsequent allotment, see *post*, p. VI.)

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*By order of November 17, 1975, the Court temporarily assigned MR. JUSTICE REHNQUIST to the Ninth Circuit.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

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For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

RETIREMENT OF MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

MONDAY, NOVEMBER 17, 1975

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

I have a statement to make on behalf of the Court. The announcement of Mr. Justice Douglas' retirement as a member of this Court was made on Wednesday last week. We on the Court who have been intimate witnesses to his gallant struggle to recover his health and his strength hope, now that he is free from the incessant burden that his high sense of duty placed on him, he will be able to direct his great courage and his infinite willpower to recovering his health.

Our feelings about him officially as his colleagues, and personally as his friends, are more fully expressed in a letter signed by all of the members of the Court and Justice Douglas' reply to that letter. These letters, I think, will suggest something of the nature of the relationships within the Court in the constant contacts that occur day by day in an institution in which all of the members must act together and work together on every matter that comes before the Court.

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF THE CHIEF JUSTICE,
Washington, D. C., November 14, 1975.

DEAR BILL:

Only when you made your decision known did we fully sense what that meant to us and to the Court. For us, as colleagues and friends, your absence from the Conference table and our deliberations will be deeply felt. Whether ultimately we agreed or not, as colleagues we valued highly your unparalleled knowledge of the multitude of decisions of the Court covering more than one-third of this century. It was a unique resource for the Court and one that may never again be present at our Conference table. We shall always remember your occasional verbal "footnotes" telling us intimate details as to how some opinion evolved. As friends we shall miss the daily contacts, which have varied in length and kind for each of us. Some have long been colleagues, some have argued before you, some have come here more recently, but all of us share great respect and affection for you.

The hope on our part is that, relieved of the burdens of Court work, your health will improve, and this eases our sense of loss. In the months since last January we have felt boundless admiration for your courageous fight to recover your strength and your placing duty above concern for your health.

So much has been said and will be said on other occasions about your remarkable career that no more need be noted now than to recall that it is far more than a record of longevity, for it spanned a period in American history comparable to that of the formative period early in the 19th century when Marshall and then Taney were here.

We shall miss your vast reservoir of firsthand knowledge of the Court's cases of the past 36 years and, as

well, the warm daily contacts in Conference and on the Bench. It goes without saying that we shall expect you to share our table as usual, for you remain Senior Justice Emeritus.

Sincerely,

WARREN E. BURGER
WILLIAM J. BRENNAN, Jr.
POTTER STEWART
BYRON R. WHITE
THURGOOD MARSHALL
HARRY A. BLACKMUN
LEWIS F. POWELL, Jr.
WILLIAM H. REHNQUIST

MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES,
CHAMBERS OF JUSTICE WILLIAM O. DOUGLAS,
Washington, D. C., November 14, 1975.

MY DEAR BRETHREN:

Your message, written on my retirement from the Court, filled my heart with overflowing emotion. You were kind and generous and made every hour, including the last one on our arduous journey, happy and relaxed.

I am reminded of many canoe trips I have taken in my lifetime. Those who start down a water course may be strangers at the beginning but almost invariably are close friends at the end. There were strong headwinds to overcome and there were rainy as well as sun drenched days to travel. The portages were long and many and some were very strenuous. But there were always a pleasant camp in a stand of white bark birch and water concerts held at night to the music of the loons; and inevitably there came the last camp fire, the last breakfast cooked over last night's fire, and the parting was always sad.

And yet, in fact, there was no parting because each happy memory of the choice parts of the journey—and of the whole journey—was of a harmonious united effort filled with fulfilling and beautiful hours as well as dull and dreary ones. The greatest such journey I've made has been with you, my Brethren, who were strangers at the start but warm and fast friends at the end.

The value of our achievements will be for others to appraise. Other like journeys will be made by those who follow us, and we trust that they will leave these wilderness water courses as pure and unpolluted as we left those which we traversed.

Yours faithfully,

WILLIAM O. DOUGLAS

THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

THE CHIEF JUSTICE said:

In accordance with tradition and practice, these letters will be made part of the permanent records of the Court and will be recorded in the Court's journal.

APPOINTMENT OF MR. JUSTICE STEVENS

SUPREME COURT OF THE UNITED STATES

FRIDAY, DECEMBER 19, 1975

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST.

THE CHIEF JUSTICE said:

This special sitting of the Court is held to receive the commission of the newly appointed Associate Justice, Circuit Judge Stevens. At this time it is a great pleasure to recognize the President of the United States.

Mr. President.

The President said:

I appear here this morning as a member of the Bar of this Court to inform the Court officially that the nomination of Circuit Judge John Paul Stevens to be an Associate Justice of the Supreme Court of the United States has been consented to by the United States Senate.

The commission appointing him as Associate Justice has been signed by me and attested by the Attorney General. Judge Stevens is present in the Courtroom ready to take his oath. I request that the Attorney General be recognized to present the commission to the Court.

THE CHIEF JUSTICE said:

Thank you, Mr. President. The Court now recognizes the Attorney General of the United States.

Mr. Attorney General Levi said:

MR. CHIEF JUSTICE, may it please the Court:

I bear with me the commission issued to Circuit Judge John Paul Stevens as an Associate Justice of this Court. It has been duly signed by the President and attested by me as Attorney General.

I move that the Clerk read this commission and that it be made part of the permanent record of the Court.

THE CHIEF JUSTICE said:

Your motion is granted, Mr. Attorney General. If you will hand the commission to the attendant so that it may be delivered to the Clerk, I will request that the Clerk read the commission.

The Clerk then read the commission as follows:

GERALD R. FORD,

PRESIDENT OF THE UNITED STATES OF AMERICA,

To all who shall see these Presents, Greeting:

KNOW YE; That reposing special trust and confidence in the Wisdom, Uprightness, and Learning of John Paul Stevens, of Illinois, I have nominated and, by and with the advice and consent of the Senate, do appoint him an Associate Justice of the Supreme Court of the United States, and do authorize and empower him to execute and fulfill the duties of that Office according to the Constitution and Laws of the said United States, and to Have and to Hold the said Office, with all the powers, privileges and emoluments to the same of right appertaining, unto Him, the said John Paul Stevens, during his good behavior.

In testimony whereof, I have caused these Letters to be made patent and the seal of the Department of Justice to be hereunto affixed.

Done at the City of Washington this seventeenth day

of December, in the year of our Lord one thousand nine hundred and seventy-five, and of the Independence of the United States of America the two hundredth.

[SEAL] GERALD R. FORD.

By the President:

EDWARD H. LEVI,
Attorney General.

The oath of office was then administered by THE CHIEF JUSTICE, and MR. JUSTICE STEVENS was escorted by the Clerk to the bench.

The oaths taken by MR. JUSTICE STEVENS are in the following words, *viz.:*

I, John Paul Stevens, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter.

So help me God.

JOHN PAUL STEVENS.

Subscribed and sworn to before me this nineteenth day of December 1975.

WARREN E. BURGER,
Chief Justice.

I, John Paul Stevens, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as Associate Justice of the Supreme Court of the United States, according to the best of my

abilities and understanding, agreeably to the Constitution and laws of the United States.

So help me God.

JOHN PAUL STEVENS.

Subscribed and sworn to before me this nineteenth day of December 1975.

WARREN E. BURGER,
Chief Justice.

THE CHIEF JUSTICE said:

Congratulations, MR. JUSTICE STEVENS.

Mr. Clerk, will you escort MR. JUSTICE STEVENS to his Chair.

THE CHIEF JUSTICE said:

MR. JUSTICE STEVENS, on behalf of all the Members of the Court and the retired Justices, I extend to you a warm welcome as an Associate Justice of this Court, and wish for you a long and happy career in our common calling.

MR. JUSTICE MARSHALL and MR. JUSTICE POWELL each asked me to convey to you this morning their best wishes and their regrets that longstanding commitments away from Washington made it impossible to be present today.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1975

UNITED STATES *v.* MAINE ET AL.

ON JOINT MOTION FOR ENTRY OF A DECREE

No. 35, Orig. Decided March 17, 1975—
Decree entered October 6, 1975

Joint motion for the entry of a decree is granted, and a decree is entered.

Opinion reported: 420 U. S. 515

DECREE

The joint motion for entry of a decree is granted.

For the purpose of giving effect to the decision and opinion of this Court announced in this case on March 17, 1975, 420 U. S. 515, it is ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As against the defendant States of Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, the United States is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean more than three geographic miles seaward from the coastlines of those States and extending seaward to the edge of the Continental Shelf. None of the defendant States is entitled to

any interest in such lands, minerals, and resources. As used in this decree, the term "coastline" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters.

2. As against the United States, each defendant State is entitled to all the lands, minerals, and other natural resources underlying the Atlantic Ocean extending seaward from its coastline for a distance of three geographic miles, and the United States is not entitled, as against any of the defendant States, to any interest in such lands, minerals, or resources, with the exceptions provided by § 5 of the Submerged Lands Act of 1953, 67 Stat. 32, 43 U. S. C. § 1313.

3. Jurisdiction is reserved by this Court to entertain such further proceedings, including proceedings to determine the coastline of any defendant State, to enter such orders, and to issue such writs as may from time to time be deemed necessary or advisable to give proper force and effect to this decree. The United States or any defendant State may invoke the jurisdiction so reserved by filing a motion in this Court for supplemental proceedings.

DAY & ZIMMERMANN, INC. *v.* CHALLONER ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 75-245. Decided November 3, 1975

The conflict of laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487. Hence, in affirming judgment for respondents (plaintiffs below) based on the Texas law of strict liability in a diversity action in a Federal District Court in Texas for death and injury from an explosion occurring in a foreign country, the Court of Appeals erred in declining to apply the Texas choice-of-law rules for determining what substantive law governed the case.

Certiorari granted; 512 F. 2d 77, vacated and remanded.

PER CURIAM.

Respondents sued petitioner in the United States District Court for the Eastern District of Texas seeking to recover damages for death and personal injury resulting from the premature explosion of a 105-mm. howitzer round in Cambodia. Federal jurisdiction was based on diversity of citizenship. The District Court held that the Texas law of strict liability in tort governed and submitted the case to the jury on that theory. The Court of Appeals for the Fifth Circuit affirmed a judgment in favor of respondents. 512 F. 2d 77 (1975).

The Court of Appeals stated that were it to apply Texas choice-of-law rules, the substantive law of Cambodia, the place of injury, would certainly control as to the wrongful death, and perhaps as to the claim for personal injury. It declined nevertheless to apply Texas choice-of-law rules, based in part on an earlier decision in *Lester* v. *Aetna Life Ins. Co.*, 433 F. 2d 884 (CA5 1970), cert. denied, 402 U. S. 909 (1971), which it

summarized as holding that "[w]e refused to look to the Louisiana conflict of law rule, deciding that as a matter of federal choice of law, *we could not apply the law of a jurisdiction that had no interest in the case,* no policy at stake." 512 F. 2d, at 80 (emphasis in original). The Court of Appeals further supported its decision on the grounds that the rationale for applying the traditional conflicts rule applied by Texas "is not operative under the present facts"; and that it was "a Court of the United States, an instrumentality created to effectuate the laws and policies of the United States."

We believe that the Court of Appeals either misinterpreted our longstanding decision in *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487 (1941), or else determined for itself that it was no longer of controlling force in a case such as this. We are of the opinion that *Klaxon* is by its terms applicable here and should have been adhered to by the Court of Appeals. In *Klaxon, supra,* at 496, this Court said:

> "The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side. See *Erie R. Co.* v. *Tompkins,* [304 U. S. 64, 74–77 (1938)]." (Footnote omitted.)

By parity of reasoning, the conflict-of-laws rules to be applied by a federal court in Texas must conform to those prevailing in the Texas state courts. A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits. The Court of Appeals in this case

should identify and follow the Texas conflicts rule. What substantive law will govern when Texas' rule is applied is a matter to be determined by the Court of Appeals.

The petition for certiorari is granted, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings in conformity with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, concurring.

Left to my own devices, I would deny the petition for certiorari. Inasmuch, however, as the Court chooses to emphasize and correct certain misapprehensions in the Court of Appeals' opinion and to vacate that court's judgment, I merely point out that, as I read the Court's *per curiam* opinion, the Court of Appeals on remand is to determine and flatly to apply the conflict of laws rules that govern the state courts of Texas. This means to me that the Court of Appeals is not foreclosed from concluding, if it finds it proper so to do under the circumstances of this case, that the Texas state courts themselves would apply the Texas rule of strict liability. If that proves to be the result, I would perceive no violation of any principle of *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941). I make this observation to assure the Court of Appeals that, at least in my view, today's *per curiam* opinion does not necessarily *compel* the determination that it is only the law of Cambodia that is applicable.

BOEHNING, CHAIRMAN COMMISSIONER, STATE HIGHWAY COMMISSION, ET AL. *v.* INDIANA STATE EMPLOYEES ASSN., INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74–1544. Decided November 11, 1975

In this suit raising the question whether the federal constitutional rights of respondent state employee were violated by her discharge from employment over her request for a pretermination hearing, the District Court properly abstained from deciding that question pending state-court construction of the relevant state statutes, because it appears that the statutes may require the hearing demanded, thus obviating the need for decision on constitutional grounds.

Certiorari granted; 511 F. 2d 834, reversed and remanded.

PER CURIAM.

Respondent Musgrave, an employee of the Indiana State Highway Commission, was dismissed for cause, her request for a pretermination hearing having been denied. She then brought this 42 U. S. C. § 1983 suit asserting hearing rights rooted in the Federal Constitution and seeking damages and injunctive relief. The District Court held that the controlling state statutes, as yet unconstrued by the state courts, might require the hearing demanded by respondent and so obviate decision on the constitutional issue. It therefore abstained until construction of the Indiana statutes had been sought in the state courts. The Court of Appeals for the Seventh Circuit reversed, finding nothing in the language of the relevant state statutes that would support a claim for a pretermination hearing and then resolving the federal constitutional question in respondent's favor.

We reverse. Where the Indiana Administrative Adjudication Act is applicable, "[t]he final order or

determination of any issue or case applicable to a particular person shall not be made except upon hearing and timely notice of the time, place and nature thereof." Ind. Code § 4–22–1–5 (1974). The Act applies to all issues or cases applicable to particular persons "excluding . . . the dismissal or discharge of an officer or employee by a superior officer, but including hearings on discharge or dismissal of an officer or employee for cause where the law authorizes or directs such hearing." § 4–22–1–2. It may be that the Court of Appeals is correct in its "forecast," see *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496, 499 (1941), that when construed together by the state courts, the Administrative Adjudication Act and the Indiana Bipartisan Personnel System Act, which is applicable to Highway Commission employees and which neither expressly authorizes nor precludes termination hearings, would not require the hearing respondent has demanded. On the other hand, the relevant statutory provisions may fairly be read to extend such hearing rights to respondent;*

*The possibility that the Indiana state courts would adopt the construction contrary to that of the Court of Appeals for the Seventh Circuit is somewhat enhanced by the fact that the construction adopted by the Seventh Circuit may fairly be said to raise federal constitutional problems under recent procedural due process decisions of this Court, *e. g.*, *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), particularly if, as the Seventh Circuit appears to have assumed, the Administrative Adjudication Act would leave respondent without a state-law right to a hearing *at any time* in connection with her dismissal for cause. The state courts may be reluctant to attribute to their legislature an intention to pass a statute raising constitutional problems, unless such legislative intent is particularly clear. See, *e. g.*, *Kent* v. *Dulles*, 357 U. S. 116, 129–130 (1958); *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974). See Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071, 1117–1118 (1974).

Although the question of respondent's federal constitutional right to a hearing *at some time*, in connection with a discharge for cause

and in these circumstances we conclude that the District Court was right to abstain from deciding the federal constitutional issue pending resolution of the state-law question in the state courts. *Meridian* v. *Southern Bell T. & T. Co.*, 358 U. S. 639, 640 (1959); *Reetz* v. *Bozanich*, 397 U. S. 82 (1970); *Harman* v. *Forssenius*, 380 U. S. 528 (1965); *Fornaris* v. *Ridge Tool Co.*, 400 U. S. 41 (1970); *Railroad Comm'n* v. *Pullman Co.*, *supra*.

The petition for certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded for further consideration consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS, dissenting.

The position of the Court continues the strangulation of 42 U. S. C. § 1983 that has recently been evident. See, *e. g.*, *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). The road of the respondent employee has been longer and more expensive than the Congress planned. See *Harrison* v. *NAACP*, 360 U. S. 167, 179–184 (1959) (DOUGLAS, J., dissenting). I would affirm the decision of the Court of Appeals.

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may already have been resolved in respondent's favor in *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Board of Regents* v. *Roth*, 408 U. S. 564 (1972); and *Arnett* v. *Kennedy*, *supra*, the tenured employee's right to a *preremoval* hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing *before* removal coupled with a full hearing after removal. See concurring opinion of POWELL, J., in *Arnett* v. *Kennedy*, *supra*, at 164, 170.

CONNECTICUT *v.* MENILLO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 74–1569. Decided November 11, 1975

Connecticut statute making criminal an attempted abortion by "any person" *held* to remain fully effective against performance of abortions by nonphysicians after *Roe* v. *Wade,* 410 U. S. 113, and *Doe* v. *Bolton,* 410 U. S. 179.

Certiorari granted; 168 Conn. 266, 362 A. 2d 962, vacated and remanded.

PER CURIAM.

In 1971 a jury convicted Patrick Menillo of attempting to procure an abortion in violation of Connecticut's criminal abortion statute. Menillo is not a physician and has never had any medical training. The Connecticut Supreme Court nevertheless overturned Menillo's conviction, holding that under the decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), the Connecticut statute was "null and void." As we think the Connecticut court misinterpreted *Roe* and *Doe,* we grant the State's petition for certiorari and vacate the judgment.

The statute under which Menillo was convicted makes criminal an attempted abortion by "any person." [1] The Connecticut Supreme Court felt compelled to hold this statute null and void, and thus incapable of constitu-

[1] Conn. Gen. Stat. Rev. § 53–29:

"Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison not more than five years or both."

tional application even to someone not medically qualified to perform an abortion, because it read *Roe* to have done the same thing to the similar Texas statutes. But *Roe* did not go so far.

In *Roe* we held that Tex. Penal Code, Art. 1196, which permitted termination of pregnancy at any stage only to save the life of the expectant mother, unconstitutionally restricted a woman's right to an abortion. We went on to state that as a result of the unconstitutionality of Art. 1196 the Texas abortion statutes had to fall "as a unit," 410 U. S., at 166, and it is that statement which the Connecticut Supreme Court and courts in some other States have read to require the invalidation of their own statutes even as applied to abortions performed by nonphysicians.[2] In context, however, our statement had no such effect. Jane Roe had sought to have an abortion " 'performed by a competent, licensed physician, under safe, clinical conditions,' " *id.*, at 120, and our opinion recognized only her right to an abortion under those circumstances. That the Texas statutes fell as a unit meant only that they could not be enforced, with or without Art. 1196, in contravention of a woman's right to a clinical abortion by medically competent personnel. We did not hold the Texas statutes unenforceable against a nonphysician abortionist, for the case did not present the issue.

Moreover, the rationale of our decision supports continued enforceability of criminal abortion statutes against nonphysicians. *Roe* teaches that a State cannot restrict

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[2] See, *e. g.*, *State* v. *Hultgren*, 295 Minn. 299, 204 N. W. 2d 197 (1973); *Commonwealth* v. *Jackson*, 454 Pa. 429, 312 A. 2d 13 (1973). The highest courts of other States have held that their criminal abortion laws can continue to be applied to laymen following *Roe* and *Doe*. *E. g.*, *People* v. *Bricker*, 389 Mich. 524, 208 N. W. 2d 172 (1973); *State* v. *Norflett*, 67 N. J. 268, 237 A. 2d 609 (1975).

a decision by a woman, with the advice of her physician, to terminate her pregnancy during the first trimester because neither its interest in maternal health nor its interest in the potential life of the fetus is sufficiently great at that stage. But the insufficiency of the State's interest in maternal health is predicated upon the first trimester abortion's being as safe for the woman as normal childbirth at term, and that predicate holds true only if the abortion is performed by medically competent personnel under conditions insuring maximum safety for the woman. See 410 U. S., at 149–150, 163; cf. statement of DOUGLAS, J., in *Cheaney* v. *Indiana*, 410 U. S. 991 (1973), denying certiorari in 259 Ind. 138, 285 N. E. 2d 265 (1972). Even during the first trimester of pregnancy, therefore, prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference. And after the first trimester the ever-increasing state interest in maternal health provides additional justification for such prosecutions.

As far as this Court and the Federal Constitution are concerned, Connecticut's statute remains fully effective against performance of abortions by nonphysicians. We express no view, of course, as to whether the same is now true under Connecticut law. Accordingly, the petition for certiorari is granted, the judgment of the Supreme Court of Connecticut is vacated, and the case is remanded to that court for its further consideration in light of this opinion.

So ordered.

MR. JUSTICE WHITE concurs in the result.

NORTHERN INDIANA PUBLIC SERVICE CO. *v.* PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 75–4. Decided November 11, 1975

The Court of Appeals erred in setting aside the Atomic Energy Commission's Licensing and Appeal Boards' approval of a construction permit for a commercial nuclear powered electric generating plant on the ground that the Boards failed to follow the AEC's own regulations governing the minimum allowable "population center distance" in nuclear plant siting. Where, even if the meaning is not free from doubt, the AEC's reliance upon the actual boundaries of population density, rather than upon political boundaries, in its interpretation of the regulations sensibly conforms to the purpose and wording of the regulations and comports with prior agency decisions, the Court of Appeals was obligated to regard such a reasonable administrative interpretation as controlling.

Certiorari granted; 515 F. 2d 513, reversed and remanded.

PER CURIAM.

An Atomic Energy Commission Atomic Safety and Licensing Board approved the issuance of a construction permit to Northern Indiana Public Service Co. (NIPSCO) for a commercial nuclear powered electrical generating plant proposed to be built on the south shore of Lake Michigan, in Porter County, Ind., RAI–74–4, p. 557 (1974). On appeal, an AEC Atomic Safety and Licensing Appeal Board, RAI–74–8, p. 244 (1974), sustained the approval. On petition for review by intervenors in the administrative proceedings,[1] a divided panel

[1] Porter County Chapter of the Izaak Walton League of America, Inc.; Concerned Citizens Against Bailly Nuclear Site; Businessmen

of the Court of Appeals for the Seventh Circuit set aside the approval on the ground that the Licensing Board and the Appeal Board failed to follow the Commission's own regulations governing "population center distance" in the nuclear plant siting. 515 F. 2d 513 (1975). The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

Title 10 CFR § 100.10 (b) (1975) of the Commission's regulations provides that "the Commission will take . . . into consideration in determining the acceptability of a [proposed nuclear plant] site" the "population center distance," defined in 10 CFR § 100.3 (c) (1975) as "the distance from the reactor to the nearest boundary of a densely populated center containing more than about 25,000 residents." At the time of NIPSCO's application and also at the time of the Court of Appeals' decision, 10 CFR § 100.11 (a)(3) (1975) further provided, in pertinent part, that "[a]s an aid in evaluating a proposed site" for a nuclear power plant a permit applicant should determine for the proposed unit a

> "population center distance of at least one and one-third times the distance from the reactor to the outer boundary of the low population zone. In applying this guide, due consideration should be given to the population distribution within the population center."

Two miles was the minimum allowable "population center distance" determined administratively pursuant to § 100.11 (a)(3). Accepting this determination, the Court of Appeals held that issuance of the construction permit violated the agency's own regulations be-

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for the Public Interest, Inc.; James E. Newman; Mildred Warner; and George Hanks.

NIPSCO, the State of Illinois, and the city of Gary, Ind., intervened before the Court of Appeals.

cause the corporate boundary of the city of Portage, Ind.—projected to have a population in excess of 25,000 by 1980—lay within 1.1 miles of NIPSCO's proposed site. In reaching this conclusion the Court of Appeals rejected the agency's administrative interpretation of its regulations as prescribing computation of "population center distance" for § 100.11 (a)(3) purposes, where the difference is critical to the siting decision, not solely to a political boundary but to the boundary of "that portion of the population center at which the dense population starts," RAI–74–4, at 565. Under that interpretation of the regulations the "population center distance" was an acceptable 4.5 miles.[2]

The Court of Appeals erred in rejecting the agency's interpretation of its own regulations. That interpretation is supported by the wording of the regulations and is consistent with prior agency decisions.[3] The wording does not equate a "dense population center" with a city or other political entity, nor does it define a "boundary" in terms of pre-existing lines drawn for nonsiting purposes. Rather, the regulations require consideration of "population distribution within the population center" in applying the "population center distance" guide. Political boundaries, in contrast, may be drawn for many

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[2] We do not understand the Court of Appeals' discussion of the evidence regarding population distribution within Portage to imply an alternative ground for the holding that the agency violated its own regulations.

[3] *In re Consumers Power Co.*, 5 A. E. C. 214, 218 (1972) (although political boundary of nearby city was within low-population zone, "the reduced population distance was acceptable" since "populous areas" of the city were farther removed from the reactor site than one and one-third times the low-population zone radius); *In re Consolidated Edison Co.*, 5 A. E. C. 43, 45 (1972); cf. *In re Southern California Edison Co.* (San Onofre Station), RAI–74–12, pp. 957, 960 n. 7 (1974).

reasons irrelevant to safe reactor siting, and thus encompass areas never likely to harbor a significant population.[4] But even if the meaning is not free from doubt, the agency's reliance upon the actual boundaries of population density in its interpretation sensibly conforms to the purpose and wording of the regulations. In that circumstance, the Court of Appeals was "obligated to regard as controlling [such] a reasonable, consistently applied administrative interpretation . . . ." *Ehlert* v. *United States*, 402 U. S. 99, 105 (1971). See also *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965); *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 413–414 (1945).[5]

The judgment is reversed, and the case is remanded for consideration of other contentions against the issuance of the construction permit not decided by the Court of Appeals.

So ordered.

MR. JUSTICE DOUGLAS, concurring.

The Atomic Energy Commission, by general regulations, limited the location of nuclear power plants so as not to be nearer than a specified number of miles from population centers. After issuing a construction

[4] The Court of Appeals' opinion also notes that the boundaries of 1970 census enumeration districts, including an area within Portage's political limits, lay less than a mile from the proposed reactor site. The location of these boundaries, however, without more, has no greater significance than the location of the corporate border.

[5] Our decision does not rely upon a revision of 10 CFR § 100.11 (a)(3), 40 Fed. Reg. 26526 (1975), published after the decision of the Court of Appeals by the Nuclear Regulatory Commission, which, pursuant to the Energy Reorganization Act of 1974, § 201, 88 Stat. 1242, 42 U. S. C. § 5841 (1970 ed., Supp. IV), now discharges the licensing responsibility formerly exercised by the Atomic Energy Commission.

permit which the Court of Appeals held violated those regulations, that agency's successor, the Nuclear Regulatory Commission, amended the regulations so as to permit the deviation. 40 Fed. Reg. 26526 (1975). By its decision today, the Court holds that the Court of Appeals "erred in rejecting the agency's interpretation of its own regulations." *Ante,* at 14. I read today's decision as in no way relying on the agency's *post hoc* amendment of its regulations to save in this Court its issuance of the construction permit. *Ante,* at 15 n. 5. I therefore concur in the Court's decision. The Nuclear Regulatory Commission's conduct in the course of this litigation, however, compels further comment.

A certain danger lurks in the ability of an agency to perfunctorily mold its regulations to conform to its instant needs. In the present case, regulations performed an important function of advising all interested parties of the factors that had to be satisfied before a license could be issued. If those conditions can be changed willy-nilly by the Commission after the hearing has been held and after adjudication has been made, the Commission is cut loose from its moorings, and no opponent of the licensing will be able to tender competent evidence bearing on the critical issues. Not just the Commission, but the entire federal bureaucracy is vested with a discretionary power, against the abuse of which the public needs protection. "[A]dministrators must strive to do as much as they reasonably can do to develop and to make known the needed confinements of discretionary power through standards, principles, and rules." K. Davis, Discretionary Justice 59 (1969). Confinement of discretionary power, however, cannot be obtained where rules can be changed and applied retroactively to affect a controversy.

For some years, the agency which was supposed to

promote nuclear energy was also charged with the responsibility of protecting the public against its abuse. But a promoter is naturally shortsighted when it comes to the adverse effects of his project on the community. With the establishment of the Nuclear Regulatory Commission, Congress undertook to rectify this weakness in the control system by separating the promotion function from the function of safeguarding the public.[1] But the power to change the rules after the contest has been concluded would once more put the promotion of nuclear energy ahead of the public's safety.

Eminent scientists have been steadfast in opposing the growth of nuclear power plants in this Nation. The number who think nuclear power should be abandoned has been growing.[2] The future of nuclear power in this

[1] The separation of promotional and regulatory functions was accomplished under the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U. S. C. § 5801 *et seq.* (1970 ed., Supp. IV). The legislation transferred the research and development functions of the AEC to the new Energy Research and Development Administration. § 5814 (c). The AEC's regulatory functions became the responsibility of the Nuclear Regulatory Commission. § 5841 (f). Also transferred to this new Commission were the responsibilities of the Atomic Safety and Licensing Board and the Atomic Safety and Licensing Appeal Board. § 5841 (g).

The legislative history of the Act indicates that this division of functions was "a response to growing criticism that there is a basic conflict between the AEC's regulation of the nuclear power industry and its development and promotion of new technology for the industry." S. Rep. No. 93-980, p. 2 (1974). "The [Nuclear Regulatory Commission] will have solely regulatory responsibilities, in keeping with a basic purpose of this act to separate the regulatory functions of the Atomic Energy Commission from its developmental and promotional functions, which are transferred to [the Energy Research and Development Administration]." *Id.*, at 19.

[2] J. Gofman & A. Tamplin, Poisoned Power: The Case Against Nuclear Power Plants (1971); see Ford & Kendall, What Price

country is not a policy matter for courts to decide, but those who oppose the promotion of nuclear power should have at least a chance to know what the issues are when a case is set down for hearing and adjudication, and to argue meaningfully about those issues. If the rules can be changed by the Commission at any time—even after the hearing is over—the protection afforded by the opposition of scientific and environmental groups is greatly weakened. *Ad hoc* rulemaking in those areas touching the public safety is to be looked upon with disfavor.

Nuclear Power?, 10 Trial 11 (1974); Tamplin, Reacting to Reactors, 10 Trial 15 (1974); Hearings on AEC Licensing Procedure and Related Legislation before the Subcommittee on Legislation of the Joint Committee on Atomic Energy, 92d Cong., 1st Sess., pt. 1, pp. 294–302 (1971).

ROSE, WARDEN *v.* HODGES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75–139. Decided November 11, 1975

Respondents were convicted of murder and sentenced to death. The Tennessee Court of Criminal Appeals affirmed the convictions, but reversed and remanded to the trial court on the punishment issue. Shortly thereafter the Governor commuted the death sentences to 99 years' imprisonment, and the State immediately petitioned for a rehearing in the Court of Criminal Appeals, which sustained the commutations and held its remand "for naught," thus affirming the convictions and sentences, as modified. After the State Supreme Court denied certiorari, respondents sought habeas corpus in the Federal District Court, claiming, *inter alia*, that their Fourteenth Amendment rights were violated by the illegal commutations, but the District Court dismissed on this issue for failure to exhaust state remedies. On respondents' appeal the Court of Appeals held that since the death sentences had been vacated at the time of the Governor's order, there were no death sentences to commute and hence the commutations were invalid. *Held:*

1. Whether or not respondents' sentences were subject to commutation, and the extent of the Governor's authority under the circumstances, are questions of Tennessee law which the State Criminal Appeals Court resolved in favor of the Governor's action, and it was not a federal habeas court's province to re-examine these questions.

2. Respondents' Fourteenth and Sixth Amendment rights to jury trial were not infringed by the state proceedings. After such commutations of sentences defendants are not entitled to have their sentences redetermined by a jury, the Federal Constitution affording no impediment to a State's choice to allow the Governor to reduce a death penalty to a term of years without resort to further judicial proceedings.

Certiorari granted; 519 F. 2d 1402, reversed.

PER CURIAM.

Respondents Hodges and Lewis were convicted of committing murder in the perpetration of a rape in Memphis,

Tenn., and sentenced to death by electrocution. On July 31, 1972, the Tennessee Court of Criminal Appeals affirmed the judgments of conviction but reversed and remanded the record to the trial court on the issue of punishment, declaring that "[t]he Supreme Court of the United States has decreed that the death sentence is contrary to the Eighth Amendment . . . ." *Hodges* v. *State*, 491 S. W. 2d 624, 628 (1972).

On August 7, 1972, the Governor of Tennessee commuted respondents' death sentences to 99 years' imprisonment. On August 8, 1972, the State (represented by petitioner here) filed a timely petition for rehearing in the Court of Criminal Appeals pursuant to Tenn. Code Ann. § 16-451 (Supp. 1974), which provides that such a petition must be filed within 15 days of the entry of the judgment.

The Court of Criminal Appeals then found the commutations by the Governor to be "valid and a proper exercise of executive authority," citing *Bowen* v. *State*, 488 S. W. 2d 373 (Tenn. 1972), and held its remand "for naught," thus affirming the convictions and the sentences, as modified, in full, 491 S. W. 2d, at 629. On March 5, 1973, the Supreme Court of Tennessee denied certiorari.

Respondents Hodges and Lewis then petitioned for habeas corpus in the Federal District Court asserting, *inter alia*, that their Fourteenth Amendment rights were violated by the illegal commutation of their sentences. The case was transferred to the Federal District Court for the Western District of Tennessee, which dismissed as to this issue for failure to exhaust state remedies. Respondents appealed to the United States Court of Appeals for the Sixth Circuit.

In a brief order, that court held that since the death sentences had been vacated at the time of the Governor's

commutation order, "there were . . . no viable death sentences to commute" and therefore declared the commutations invalid.[1]

Upon reconsideration, the court noted that the judgment of the Court of Criminal Appeals vacating the death penalties had been timely modified by that court to comply with the commutation order. However, it did not alter its earlier decision, except to note that respondents had exhausted their state remedies as to this point.[2]

A necessary predicate for the granting of federal habeas relief to respondents is a determination by the federal court that their custody violates the Constitution, laws, or treaties of the United States, 28 U. S. C. § 2241; *Townsend* v. *Sain,* 372 U. S. 293, 312 (1963). The one sentence in the opinion of the Court of Appeals dealing with the invalidity of the Governor's commutations contains no reference to any provision of the Constitution, laws, or treaties of the United States or to any decision of this Court or any other court.[3] Whether or not the sentences imposed upon respondents were sub-

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[1] This order would have returned respondents to the trial court for resentencing to between 20 years and life as a jury might determine. Tenn. Code Ann. § 39–2405 (1956).

[2] The dissent would have us probe beneath the surface of the opinions below in search of a logical foundation. In cases where the holding of the court below is unclear, such a technique may be required. Here, however, that court clearly "hold[s] the purported commutation . . . invalid." In its second opinion it reversed the District Court on the exhaustion question and otherwise specifically reaffirmed the earlier order. We are forced to take the Court of Appeals at its word.

[3] Two other panels of the same court have correctly recognized, in cases virtually identical to this one, that no federal constitutional question was presented by such a commutation. *Smith* v. *Rose,* No. 74–1753 (Nov. 15, 1974); *Bowen* v. *Rose,* No. 74–1087 (Mar. 19, 1974).

ject to commutation by the Governor, and the extent of his authority under the circumstances of this case, are questions of Tennessee law which were resolved in favor of sustaining the action of the Governor by the Tennessee Court of Criminal Appeals in *Hodges* v. *State, supra.* It was not the province of a federal habeas court to re-examine these questions.

Respondents urge, in support of the result reached by the Court of Appeals for the Sixth Circuit, that their Fourteenth and Sixth Amendment rights to jury trial have been infringed by the Tennessee proceedings. We reject these contentions. A jury had already determined their guilt and sentenced them to death. The Governor commuted these sentences to a term of 99 years after this Court's decision in *Furman* v. *Georgia,* 408 U. S. 238 (1972). Neither *Furman* nor any other holding of this Court requires that following such a commutation the defendant shall be entitled to have his sentence determined anew by a jury. If Tennessee chooses to allow the Governor to reduce a death penalty to a term of years without resort to further judicial proceedings, the United States Constitution affords no impediment to that choice. *Dreyer* v. *Illinois,* 187 U. S. 71 (1902). Cf. *Schick* v. *Reed,* 419 U. S. 256 (1974).

The motion of the respondents for leave to proceed *in forma pauperis* and the petition for certiorari are granted, and the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE DOUGLAS would deny certiorari.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

I dissent on two grounds: *first,* because the Court errs in reading the record to include a final holding of the Court of Appeals declaring the commutations to be in-

valid; and, *second,* because if there were such a final holding, summary disposition of the question of the validity of the commutations—certainly one of first impression in this Court—is particularly inappropriate.[1]

That the "commutations" have not been finally declared invalid clearly emerges from the record of the proceedings in the District Court and in the Court of Appeals. The petition for habeas corpus alleged five errors by the state courts. Three (coerced confessions, prejudicial comments during *voir dire,* Hodge's claim under *Bruton* v. *United States,* 391 U. S. 123 (1968)) attacked respondents' convictions, the other two the sentences (invalid jury sentence and unconstitutional commutations). The District Court held that respondents had failed to exhaust state remedies on all of these issues except the alleged invalidity of the jury sentence; accordingly, the District Court issued a show-cause order "solely on the issue that the jury allegedly failed to specify the degree of murder in the verdicts." *Hodges* v. *Rose,* No. C–73–442 (WD Tenn., Nov. 15, 1973). The State accordingly filed an answer dealing only with this issue, and the District Court decided only that issue, rejecting respondents' claim on the merits. This question was therefore the only claim that was ripe for appeal; specifically, there was no decision of the District Court on the constitutionality of the commutations that was or could have been the subject of respondents' appeal to the Court of Appeals.[2]

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[1] Neither of the decisions cited by the Court is apposite. *Dreyer* v. *Illinois,* 187 U. S. 71 (1902), held merely that the Due Process Clause of the Fourteenth Amendment does not bar executive exercise of sentencing powers. *Id.,* at 84. *Schick* v. *Reed,* 419 U. S. 256 (1974), where the President reduced petitioner's death penalty to life imprisonment, was not a case where the death sentence had been judicially voided when the President acted.

[2] The cases cited by the Court in which panels in the Sixth Cir-

Nevertheless, it is of course true that the initial opinion of the Sixth Circuit contains the following language:

> "[The] commutation followed by some eight days an order of the Tennessee Court of Criminal Appeals vacating the order imposing the death penalty and remanding the case to the trial court for punishment determination in the light of *Furman v. Georgia,* 408 U. S. 238 [(1972)], *and for the reason that there were therefore no viable death sentences to commute, we hold the purported commutation and the concomitant imposition of committed* [*sic*] *sentences for terms of 99 years invalid.*" *Hodges* v. *Rose,* No. 74–1461 (CA6, Feb. 25, 1975). (Emphasis added.)

The same opinion goes on to affirm the decision on the merits of the only question decided by the District Court, namely, the jury-sentence issue, and then observes that the State had confessed error on the exhaustion point. Accordingly, the judgment was "for further proceedings consistent herewith." This necessarily must have meant that the three constitutional attacks on the convictions

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cuit have upheld similar commutations in other cases, *ante,* at 21 n. 3, serve to substantiate my reading of the record. Judge Miller was a member of the panel in *Smith* v. *Rose,* No. 74–1753 (CA6, Nov. 15, 1974), and Judge Peck participated in *Bowen* v. *Rose,* No. 74–1087 (CA6, Mar. 19, 1974). Both judges were also on the panel in the instant case, and the alleged inconsistency among the panel decisions was noted in the State's petition for rehearing. The Court's implicit suggestion that these federal judges issued conflicting decisions, without explanation, indicates the inaccuracy of the Court's view of the record.

Moreover, neither of the cited unpublished panel opinions explicitly states that the commutation being upheld was issued after a death sentence had been judicially voided. Parenthetically, the Sixth Circuit's Rule 11 prohibits citation of unpublished opinions. Am I to understand that this Court is not called upon to respect that prohibition?

should be addressed on the merits by the District Court. The *sua sponte* comments on the commutations thus made no sense since that issue would never arise if the convictions were set aside on any of the three grounds.

Not surprisingly, therefore, the State sought rehearing. The State dispositively argued, *first,* that the Sixth Circuit was precluded from addressing the commutation issue since the District Court had carefully confined its decision on the merits to the validity of the jury sentence. The State argued, *second,* that there had been no opportunity to argue the commutation question in the District Court and that no record had been made on the issue, and, *third,* the commutation issue had not been briefed in the Sixth Circuit. *Fourth,* and finally, the State argued—what surely must have been crystal clear—that the commutation question would never be reached if respondents prevailed on their challenge to the validity of their convictions. True, as a good lawyer's would, the State's petition for rehearing challenged in any event the soundness of the statement that the commutations were invalid. But the relief sought on rehearing was excision of the language quoted above and remand "to the District Court for consideration of all issues."

The Court of Appeals obviously recognized its error. The opinion on rehearing, while not deleting the whole statement, did delete the language emphasized above and left only the factual statement of what had occurred:

> "[The] commutation followed by some eight days an order by the Tennessee Court of Criminal Appeals vacating the [order imposing the] death penalty and remanding the case [to the trial court] for punishment determination in the light of *Furman* v. *Georgia,* 408 U. S. 238 [(1972)]." *Hodges* v. *Rose,* No. 74–1461 (CA6, June 10, 1975).

Significantly the opinion on rehearing also squarely held

that the District Court had erred in finding a failure to exhaust as to the commutation issue.

On this record, therefore, the only proper disposition is denial of the petition for certiorari. At the least, we should vacate and remand to the Sixth Circuit for clarification of whether the validity of the commutations was addressed and decided.

In any event, summary disposition of the issue of the validity of the commutations is strikingly inappropriate. There is no record in the lower courts on the commutation issue, because the District Court limited the habeas proceeding to the validity of the jury sentence. More importantly, the issue is one of first impression in this Court, and it surely merits briefing and oral argument. For example, I find troublesome the question whether (since there existed no viable death sentences to commute) the Governor's action should be treated as imposing the 99-year sentences without affording respondents constitutionally secured safeguards required when sentences are imposed. If the Governor had not acted, resentencing would have been by a jury at a proceeding highlighted by the usual safeguards, none of which applied to the Governor's action. The question is plainly not insubstantial; in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), we held that constitutional safeguards (there the right to counsel) applied to the sentencing stage. Was the commutation in this case actually the sentencing stage since no death sentence existed to commute when the Governor acted? Also, the due process dimensions of the right to present evidence relevant to sentencing was left open in *McGautha* v. *California*, 402 U. S. 183, 218–220 (1971). If respondents were "sentenced" by the Governor, were they denied due process when not afforded that opportunity, even assuming that the Federal Constitution permits States to adopt executive in preference to

judicial sentencing? I agree that the Constitution allows Tennessee to empower the Governor to reduce a death penalty to a term of years without resort to judicial proceedings. But the Court's disposition assumes, without any in-depth analysis, that the instant case involves such "commutations" despite the fact that respondents' death sentences were voided and were therefore nonexistent when the Governor acted.

I would deny the petition for certiorari on my view that there is no holding of the Court of Appeals regarding the commutations to be reviewed. In any event, rather than disposing of the case summarily, the Court should grant the petition and set the case for oral argument.

TRANSAMERICAN FREIGHT LINES, INC. *v.* BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 74–54. Argued October 8, 1975—Decided November 12, 1975

Respondent Brada Miller and petitioner Transamerican, two licensed motor carriers, made an agreement whereby respondent leased a vehicle to petitioner, to be operated by respondent's driver over petitioner's authorized route. Under the lease petitioner was to "have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission," but respondent agreed to indemnify petitioner for claims arising out of respondent's negligence, though the indemnification clause specifically did not limit petitioner's liability to the public in connection with the use of the leased equipment. While the vehicle was being operated under the lease, an accident occurred, and a suit was brought against the carriers predicated on the negligence of the vehicle's driver. Petitioner settled the claim and then sought recovery against respondent in District Court under the indemnification clause. That court granted respondent's motion for summary judgment on the ground that the clause contravened an ICC regulation requiring that lease agreements between regulated carriers must contain a written undertaking that "control and responsibility for the operation of the equipment shall be that of the lessee." The Court of Appeals affirmed, reasoning that since respondent, contrary to the intent of the regulation, had agreed to bear the costs of its own negligence, it had assumed control and responsibility and that the indemnification clause was ineffective. *Held:* The indemnification agreement entered into by petitioner and respondent does not contravene ICC's control-and-responsibility requirement. Pp. 35–43.

(a) An indemnification agreement violates the ICC requirement only if the lessor was in control of the service provided as well as of the vehicle's physical operation. Here control over the vehicle, as agreed between the parties, remained in petitioner, and the furnishing of respondent's driver involved only ministerial

control and not delegation of responsibility for the shipment. Pp. 38–40.

(b) Nor did the indemnification provision conflict with ICC safety regulations, because such a provision, which places ultimate financial responsibility on the negligent lessor, may tend to increase rather than diminish protection of the public. P. 41.

497 F. 2d 926, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurred in the judgment.

Alphonso H. Voorhees argued the cause and filed briefs for petitioner.

Joseph L. Leritz argued the cause and filed a brief for respondent Brada Miller Freight Lines, Inc.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case we are concerned with the "control and responsibility" requirement of the Interstate Commerce Commission's equipment leasing regulation, 49 CFR § 1057.3 (a) (1975),[1] applicable to authorized motor car-

Solicitor General Bork, Assistant Attorney General Kauper, Carl D. Lawson, Fritz R. Kahn, and *Betty Jo Christian* filed a brief for the United States et al. as *amici curiae* urging reversal.

[1] The pertinent phrase in 49 CFR § 1057.3 (a) (1975) is "control and responsibility for the operation of the equipment." Section 1057.3 (a) reads in full as follows:

"The provisions of § 1057.4, except paragraphs (c) and (d), relative to inspection and identification of equipment, shall not apply:

"(a) *Equipment used in the direction of a point which lessor is authorized to serve.* To equipment owned or held under a lease of 30 days or more by an authorized carrier and regularly used by it in the service authorized, and leased by it to another authorized carrier for transportation in the direction of a point which lessor is authorized to serve: *Provided,* That the two carriers have first

riers. The question before us is narrow: Does the control-and-responsibility requirement prohibit, as against public policy, an agreement between carriers by which the lessor indemnifies the lessee for loss caused by the negligence of the lessor?

I

On January 19, 1968, respondent Brada Miller Freight Systems, Inc., entered into an agreement with petitioner Transamerican Freight Lines, Inc., whereby Brada Miller, as lessor, leased to Transamerican, as lessee, a tractor and trailer operated by driver H. L. Hardrick for a trip from Detroit, Mich., to Kansas City, Mo.[2] Transamerican held authority from the ICC to serve those points, and the leased equipment was to be operated over Transamerican's routes "without deviation." Brada Miller represented that, as § 1057.3 (a) specifies, Kansas City was "in the direction of a point" which it was "authorized to serve." The lease recited that the equipment was

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agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee from the time the equipment passes the inspection required to be made by lessee or its representative under § 1057.4 (c) until such time as the lessor or its representative shall give to the lessee or its representative a receipt specifically identifying the equipment and stating the date and the time of day possession thereof is retaken or until such time as the required inspection is completed by another authorized carrier taking possession of the equipment in an interchange of equipment where such use is contemplated, such writing to be signed by the parties or their duly authorized regular employees or agents, and a copy thereof carried in the equipment while the equipment is in the possession of the lessee."

In § 1057.4 (a)(4), relating to equipment other than that exchanged in interstate service and other than that leased by one authorized carrier to another, the parallel provision is "exclusive possession, control, and use of the equipment, and . . . the complete assumption of responsibility in respect thereto."

[2] At the time, Brada Miller itself held the equipment under a lease dated November 1967.

"to be operated only by a competent employee" of Brada Miller, "in which event said employee . . . shall be the representative of" Brada Miller. App. 90; Brief for Petitioner A–2. It further provided:

> "4. It is mutually understood and agreed, that [Transamerican] during the term of this lease shall have the control and responsibility for the operation of said equipment in respect to the public, shippers and Interstate Commerce Commission for such period that said equipment is operated under the terms of this lease as provided in Paragraph 1 hereof.
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> . . . . .
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> "9. . . . [Brada Miller] hereby agrees to indemnify and save harmless [Transamerican] from any and all claims, suits, losses, fines or other expenses arising out of, based upon or incurred because of injury to any person or persons, or damage to property sustained or which may be alleged to have been sustained by reason of any negligence or alleged negligence on the part of [Brada Miller], its agents, servants or employees . . . . Nothing in this Paragraph 9 contained shall be construed to in anywise limit the liability of [Transamerican] to the public in connection with the use of said equipment under this Agreement." *Ibid.*

Hardrick was a Brada Miller driver and employee. Pursuant to the Commission's regulation, 49 CFR § 1057.4 (c) (1975), Transamerican, before the trip, made the required inspection of the equipment and filed a report that it was safe. App. 66–67, 89, 90. It checked the medical report on Hardrick. *Id.*, at 75. It affixed to the door of the tractor an identification placard stating that it was operated by Transamerican and reciting its number assigned by the ICC; the placard remained so affixed throughout the trip. *Id.*, at 55–58, 63–65.

On the way to Kansas City, and near Smithboro, Ill., the vehicle driven by Hardrick and an automobile operated by Sandra Wear collided. Wear was injured. Transamerican reported the accident on the ICC's prescribed form. Wear later filed suit in the United States District Court for the Southern District of Illinois against both Brada Miller and Transamerican. She alleged that the accident was caused by Hardrick's negligence. Brada Miller and Transamerican filed cross-claims against each other in that litigation. During the trial Wear settled her claim against Transamerican for $80,000 and dismissed her cause of action with prejudice.[3] Transamerican then amended its cross-claim by pleading the settlement and seeking recovery from Brada Miller for the settlement amount plus the expenses incurred in defending the Wear action.

Brada Miller in due course moved for summary judgment against Transamerican. It did so on the ground that "the pleadings, depositions, answers to interrogatories and exhibits on file show that the indemnity provision of the trip lease . . . is contrary to public policy and is unenforceable." *Id.*, at 91.

The District Court granted Brada Miller's motion. In an unreported opinion, the court cited § 204 (e) of the Interstate Commerce Act, 24 Stat. 379, as added, 49 Stat. 543, as amended, 49 U. S. C. § 304 (e),[4]

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[3] The order of dismissal preserved the rights of Transamerican in its cross-claim against Brada Miller. Diversity of citizenship remained after the settlement.

[4] "Subject to the provisions of subsection (f) [setting forth exceptions not material here] of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property—

"(1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto,

which authorizes the Commission to prescribe regulations with respect to motor carriers' use, under leases, of motor vehicles not owned by them, and § 1057.4 (a)(4) of the regulations,[5] issued pursuant to that authority, as governing the lease between Brada Miller and Transamerican. It then followed what it regarded as precedent that had been established by its controlling court in *Alford* v. *Major*, 470 F. 2d 132 (CA7 1972). In *Alford* the Seventh Circuit had concluded:

> "Therefore, since the indemnification clause would permit Major to circumvent the regulations' requirement that leased carriers exert actual control over the leased equipment and the borrowed drivers, we

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shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and

"(2) such other regulations as may be reasonably necessary in order to assure that while motor vehicles are being so used the motor carriers will have full direction and control of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, as if they were the owners of such vehicles, including the requirements prescribed by or under the provisions of this chapter with respect to safety of operation and equipment and inspection thereof."

[5] Under the facts, this appears to be an inadvertent reference. Section 1057.3 of the regulations states that the cited § 1057.4, "except paragraphs (c) and (d)" thereof, "shall not apply" to certain equipment, such as the tractor and trailer in question, leased by one authorized carrier to another authorized carrier, provided that the carriers "have first agreed in writing that control and responsibility for the operation of the equipment shall be that of the lessee." See n. 1, *supra*. Brada Miller and Transamerican were authorized carriers and they had made the specified agreement. The section's proviso, however, in substance is the same as the parallel provision in § 1057.4 (a)(4), cited by the District Court. The miscitation, therefore, is of no significance here.

find that the indemnification clause is unenforceable." *Id.*, at 135.

The Court of Appeals affirmed with an unpublished opinion. *Wear* v. *Transamerican Freight Lines*, 497 F. 2d 926 (CA7 1974). It, too, relied on 49 U. S. C. § 304 (e), on 49 CFR § 1057.4, and on its earlier *Alford* case. It emphasized its observation in *Alford*, 470 F. 2d, at 135, quoting the trial court in that case, that the intent of the regulations "'was to make sure that licensed carriers would be responsible in fact, as well as in law, for the maintenance of leased equipment and the supervision of borrowed drivers.'" Pet. for Cert. A–10. It felt that "control and cost bearing" were related, and that the regulations required the party with the duty of responsibility and control under the statute "to internalize the cost of any breach of this duty." *Id.*, at A–12. It reasoned that inasmuch as Brada Miller had agreed to bear the costs of its own negligence, it had assumed control and responsibility and that the indemnification clause therefore was ineffective.

Because the Court of Appeals asserted, *ibid.*, that *Alford* could not be distinguished from *Allstate Ins. Co.* v. *Alterman Transport Lines, Inc.*, 465 F. 2d 710 (CA5 1972), we granted certiorari.[6] 420 U. S. 971 (1975).

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[6] Despite the presence of some distinguishing features, and despite some attempts to distinguish, cases seemingly consistent with the decision below are *Denver Midwest Motor Freight, Inc.* v. *Busboom Trucking, Inc.*, 190 Neb. 231, 207 N. W. 2d 368 (1973), and *Gordon Leasing Co.* v. *Navajo Freight Lines*, 130 N. J. Super. 290, 326 A. 2d 114 (1974). Seemingly opposed, in addition to *Alterman*, are *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.*, 492 F. 2d 243 (CA4 1974), cert. pending, No. 73–1750; *Indiana Refrigerator Lines, Inc.* v. *Dalton*, 516 F. 2d 795 (CA6 1975), cert. pending, No. 75–211; *Indiana Ins. Co.* v. *Parr Trucking Service, Inc.*, 510 F. 2d 490, 494 (CA6 1975); *Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.*, 507 F. 2d 100 (CA6 1974),

II

The issue before us, therefore, is whether the indemnification provision in the lease agreement between Brada Miller and Transamerican violates the Commission's applicable regulation and, as a consequence, is contrary to public policy and unenforceable. In order to place the issue in proper perspective, we note, initially, certain general aspects of motor carrier operations.

Demand for a motor carrier's services may fluctuate seasonally or day by day. Keeping expensive equipment operating at capacity, and avoiding the waste of resources attendant upon empty backruns and idleness, are necessary and continuing objectives. It is natural, therefore, that a carrier that finds itself short of equipment necessary to meet an immediate demand will seek the use of a vehicle not then required by another carrier for its operations, and the latter will be pleased to accommodate. Each is thereby advantaged.

A lease of equipment, which is permissible under defined circumstances, must be distinguished, however, from a sharing or lending of operating authority, which is not permitted. Under the Motor Carrier Act, 1935,

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pet. for cert. pending, No. 74–973; *Cooper-Jarrett, Inc.* v. *J. Miller Corp.*, 70 Misc. 2d 88, 332 N. Y. S. 2d 177 (1972); *Newsome* v. *Surratt*, 237 N. C. 297, 74 S. E. 2d 732 (1953); *Continental Ins. Co.* v. *Daily Express, Inc.*, 68 Wis. 2d 581, 229 N. W. 2d 617 (1975). See *General Expressways, Inc.* v. *Schreiber Freight Lines, Inc.*, 377 F. Supp. 1159 (ND Ill. 1974), where a District Court in the Seventh Circuit reached the conclusion that the indemnification agreement was not unenforceable as against public policy. See also *Watkins Motor Lines, Inc.* v. *Zero Refrigerated Lines*, 381 F. Supp. 363 (ND Ill. 1974), aff'd, 525 F. 2d 538 (CA7 1975), involving an indemnification contract that accompanied an interchange agreement. The Seventh Circuit itself concluded that the indemnification agreement "serves a useful purpose and must be upheld." *Id.*, at 540. The Circuit's earlier contrary decision in *Alford*, it was felt, was "inapposite."

49 Stat. 543, as amended, 49 U. S. C. §§ 301–327, only a properly certificated carrier may haul freight in interstate or foreign commerce. Each certificate is limited as to routes, destinations, and classes of freight. 49 U. S. C. § 308 (a). See *Nelson, Inc.* v. *United States*, 355 U. S. 554 (1958); *Kreider Truck Service, Inc., Extension—Lard Oils*, 82 M. C. C. 565 (1960). As a consequence, the Commission has developed and designed its responsibility-and-control regulations in order to prevent a sharing of operating authority under the guise of a lease of equipment. With only special exceptions, the regulations require the lessee to ship under its own bill of lading, to compensate the lessor on an established basis, to inspect the equipment, and to assume full control and responsibility for the operation. 49 CFR §§ 1057.3 (a) and 1057.4. The regulations, however, do not require the lessee itself to operate the equipment; the lessor may perform that task by furnishing the driver with the equipment. But the lessee must assume the responsibility for the shipment and have full authority to control it.

III

The regulations were formulated in the 1950's in the rulemaking procedure known as *Ex parte No. MC–43*. See *Lease and Interchange of Vehicles by Motor Carriers*, 51 M. C. C. 461 (1950); 52 M. C. C. 675 (1951); 64 M. C. C. 361 (1955); and 68 M. C. C. 553 (1956). The initial formulation was sustained, against a variety of attacks, in *American Trucking Assns.* v. *United States*, 344 U. S. 298 (1953). There the Court outlined as background "the existing conditions of the motor truck industry and its regulation." *Id.*, at 302. It referred to the development of the practice by authorized carriers of using nonowned equipment by interchange and by leasing. *Id.*, at 303. "The use of nonowned equipment

by authorized carriers is not illegal, either under the Act or the rules under consideration." *Id.*, at 303–304 (footnote omitted). But it noted that the record in that case contained proof of abuses and evasions of certificated authority and of safety requirements, difficulties in the fixing of the lessee's responsibility, and other problems. *Id.*, at 304–306.

After a detailed examination of the proceedings of the Commission that resulted in the promulgation of the protective provisions at issue in this case, the Court observed: "The purpose of the rules is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system," and to assure safety of operation. *Id.*, at 310. "So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress." *Id.*, at 311. It is apparent, therefore, that sound transportation services and the elimination of the problem of a transfer of operating authority, with its attendant difficulties of enforcing safety requirements and of fixing financial responsibility for damage and injuries to shippers and members of the public, were the significant aims and guideposts in the development of the comprehensive rules.

It is likewise apparent that an important feature of the remedy the Commission devised to eliminate the undesirable practices was the rule that any lease in which the lessor furnished the driver was to be one for 30 days or more. See 49 CFR §§ 1057.3 (a) and 1057.4 (a)(3). This served to eliminate the "hard core of the problem," that is, "the owner-operator trip lease and its attendant evils." 68 M. C. C., at 555. It was effectuated by the provisions, some mentioned above, that the lease be in writing and negotiated in advance; that the equipment be identified as that of the lessee; that the lease provide

for payment to the lessor at a specified rate; that the lessee conduct a safety inspection before taking possession; and that the lessee have control and responsibility for the operation of the equipment.

Obviously, the inspection requirement of § 1057.4 (c), applicable to carriers to which § 1057.3 (a) relates, is of distinct importance. It is addressed in part to any apprehension that a lessor might furnish equipment less reliable than that of the certificated lessee. And the requirement that the lessee assume control and responsibility tends to assure that a party directly responsible to the Commission is in actual charge of the operation.

IV

In light of this background—the early conditions in the industry, the problems that existed, the rules that were evolved to resolve those problems, and the purpose of the rules—we turn specifically to the indemnification clause in the Brada Miller-Transamerican lease.

A. Whether the presence of an indemnification clause conflicts with the lease's further provision, required by § 1057.3 (a), that the lessee shall have full operational control and responsibility, was a question not directly addressed in *Ex parte No. MC–43*. We readily conclude, however, that the two provisions are not in conflict and that the indemnification clause does not impinge upon the requirements of the lease and of § 1057.3 (a) that operational control and responsibility be in the lessee. Paragraph 4 of the lease is, of course, express and clear. The parties agreed in writing that "the control and responsibility for the operation of said equipment" were in Transamerican, as lessee. This is what § 1057.3 (a) requires and it is all that it formally requires. Moreover, added to the bare words of assumption of control and responsibility, was the specification that

this was directed "to the public, shippers and Interstate Commerce Commission." The separate indemnification clause in the subsequent paragraph 9 of the lease did not affect this basic responsibility of the lessee to the public; it affected only the relationship between the lessee and the lessor. The final sentence of paragraph 9 made this clear:

> "Nothing in this paragraph 9 contained shall be construed to in anywise limit the liability of [Transamerican] to the public in connection with the use of said equipment under this Agreement."

And in this very case it was Transamerican which defended the Wear suit and settled it.

It is to be acknowledged, to be sure, that the lessor's furnishing of a driver allows an aspect of control, in a sense, to remain in the lessor. But this is ministerial control, not control of the kind with which the Commission was concerned in *Ex parte No. MC–43*. Its concern, as we have noted, was with operating authority, with routes and destinations and classes of freight, with the integrity of certifications, and with that ultimate control in the lessee that makes and keeps it responsible to the public, the shipper, and the Commission. The Commission observed:

> "It now seems to be accepted that when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation." 52 M. C. C., at 681.

The regulations do not expressly prohibit an indemnification provision in the agreement between the lessor

and the lessee. In fact, they neither sanction nor forbid it. It would seem to follow, then, that the mere presence of a clause such as the one here—that the lessor is to bear the burden of its own negligence—does not, in and of itself, offend the regulations so long as the lessee does not absolve itself from the duties to the public and to shippers imposed upon it by the Commission's regulations. This is not to say, of course, that the presence of an indemnification clause, or its character, may not be a factor to be considered in determining whether a particular arrangement between carriers is an illegal sharing of operating authority or is a legal lease of equipment.

The Commission, on occasion, has considered an indemnification clause as one element, among others, that may demonstrate lack of control and responsibility in the lessee. See *Tanksley Transfer Co. Extension—Points in Four States,* 110 M. C. C. 674, 678–679 (1969); *Diamond Transportation System, Inc., Extension—Wisconsin and Oklahoma Origins,* 117 M. C. C. 706, 712–713 (1973). But the Commission has never condemned the indemnification clause in isolation.

Although one party is required by law to have control and responsibility for conditions of the vehicle, and to bear the consequences of any negligence, the party responsible in law to the injured or damaged person may seek indemnity from the party responsible in fact. The indemnification agreement violates the Commission rules only if accompanied by other indicia demonstrating that the lessor was in control of the service provided as well as of the physical operation of the vehicle. But the clause in isolation—as framed by the issue before the District Court on the motion for summary judgment, and before the Court of Appeals, and now before us—does not do so.

B. We similarly conclude that the indemnification clause by itself does not conflict with the regulations' safety provisions. Safety in motor vehicle operation, of course, was an important concern of the Commission in its development of the equipment-leasing regulations. *American Trucking Assns.* v. *United States,* 344 U. S., at 305; 52 M. C. C., at 686–696. This concern is reflected in the provisions of §§ 1057.4 (c) and 1057.4 (e) relating, respectively, to vehicle inspections and driver familiarity with safety regulations. These provisions apply regardless of the existence of an indemnification agreement, and the lessee may fully comply with the requirements of the regulations despite its having contracted for indemnification.

An indemnification provision with respect to the lessor's negligence does not necessarily tend to lessen operational safety. On the contrary, it may increase it. The lessor, as a general rule, is the party more familiar with the equipment it leases and with the experience, ability, and record of the driver it furnishes. An agreement placing the ultimate financial responsibility upon the negligent lessor thus may have a tendency to provide greater protection to the public and to shippers. At the same time, the lessee's control and responsibility may then become more meaningful. It may also be said that the indemnification provision produces an additional source of funds for the one who is damaged or injured. These, of course, are factors that are pertinent in the evaluation of administrative policy; they are not now for this Court to evaluate. We hold only that the presence in an equipment lease of an indemnification clause directed to the lessor's negligence is not in conflict with the safety concerns of the Commission or with the regulations it has promulgated.

We utter a word of caution: our decision is not to be regarded as an indication that the Commission, if it so chooses upon study of the problem, may not one day regulate or even proscribe indemnification as between lessee and lessor.[7] We merely hold that the present regulations may not be so interpreted. See *Chicago, R. I. & P. R. Co.* v. *Chicago, B. & Q. R. Co.*, 437 F. 2d 6, 9–10 (CA7), cert. denied, 402 U. S. 996 (1971).

We therefore find ourselves in disagreement with the Court of Appeals. We emphasize that our disagreement must be viewed in the light of the narrow character of the Court of Appeals' holding to the effect that the indemnification clause in this particular agreement, in isolation, served to circumvent the regulations and was against public policy and was unenforceable. It is with that holding that we disagree and we reverse. Other issues raised by Transamerican's cross-claim and Brada Miller's answer thereto, as the parties recognize, remain undetermined. Among these, seemingly, are the questions whether the negligence that caused Wear's injury was that of Brada Miller, and whether the agreement, as a whole, was a legal lease of equipment or was an illegal

[7] The Commission and the United States in their joint brief as *amici curiae* submit that the indemnification clause by itself is not in violation of the regulations. They acknowledge that the current regulations do not specifically determine the issue before us; that on some occasion in the future the Commission may consider the promulgation of rules that bear upon indemnification agreements; and that, if so, it is possible that the Commission may come to one conclusion with respect to a provision protecting the lessee against the consequences of its own negligence, and to an opposite conclusion with respect to a provision relating to the negligence of the lessor. We note the Commission's submission here in view of the longstanding and recognized rule of deference. *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U. S. 1, 16–17 (1965).

sharing of operating authority. We express no view as to those issues; they are to be resolved upon remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the judgment.

TURNER *v.* DEPARTMENT OF EMPLOYMENT SECURITY OF UTAH ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

No. 74–1312. Decided November 17, 1975

Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected date of childbirth until six weeks after childbirth, *held* violative of the Due Process Clause of the Fourteenth Amendment as incorporating a conclusive presumption that women are unable to work during the 18-week period because of pregnancy and childbirth. *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632.

Certiorari granted; 531 P. 2d 870, vacated and remanded.

PER CURIAM.

The petitioner, Mary Ann Turner, challenges the constitutionality of a provision of Utah law that makes pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until a date six weeks after childbirth. Utah Code Ann. § 35–4–5 (h)(1) (1974).

The petitioner was separated involuntarily from her employment on November 3, 1972, for reasons unrelated to her pregnancy. In due course she applied for unemployment compensation and received benefits until March 11, 1973, 12 weeks prior to the expected date of the birth of her child. Relying upon § 35–4–5 (h)(1), the respondent Department of Employment Security ruled that she was disqualified from receiving any further payments after that date and until six weeks after the date of her child's birth. Thereafter, Mrs. Turner worked intermittently as a temporary clerical employee. After exhausting all available administrative remedies, the petitioner appealed the respondents' rulings to the Utah

Supreme Court, claiming that the statutory provision deprived her of protections guaranteed by the Fourteenth Amendment. The state court rejected her contentions, ruling that the provision violated no constitutional guarantee. 531 P. 2d 870. The petition for certiorari now before us brings the constitutional issues here.

The Utah unemployment compensation system grants benefits to persons who are unemployed and are available for employment. Utah Code Ann. § 35–4–4 (c) (1974). One provision of the statute makes a woman ineligible to receive benefits "during any week of unemployment when it is found by the commission that her total or partial unemployment is due to pregnancy." § 35–4–5 (h)(2). In contrast to this requirement of an individualized determination of ineligibility, the challenged provision establishes a blanket disqualification during an 18-week period immediately preceding and following childbirth. § 35–4–5 (h)(1). The Utah Supreme Court's opinion makes clear that the challenged ineligibility provision rests on a conclusive presumption that women are "unable to work" during the 18-week period because of pregnancy and childbirth.* See 531 P. 2d, at 871.

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*The respondents contend that the challenged provision is a limitation on the coverage of the Utah unemployment compensation system and not a presumption of unavailability for employment based on pregnancy. This characterization of the statute, advanced in an attempt to analogize the provision to the law upheld in *Geduldig* v. *Aiello*, 417 U. S. 484, conflicts with the respondents' argument to the Utah Supreme Court. Before that court respondents claimed that "'near term pregnancy is an endemic condition relating to employability.'" The Utah Supreme Court's decision is premised on the impact of pregnancy on a woman's ability to work. Its opinion makes no mention of coverage limitations or insurance principles central to *Aiello*. The construction of the statute by the State's highest court thus undermines the respondents' belated claim that the provision can be analogized to the law sustained in *Aiello*.

The presumption of incapacity and unavailability for employment created by the challenged provision is virtually identical to the presumption found unconstitutional in *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632. In *LaFleur*, the Court held that a school board's mandatory maternity leave rule which required a teacher to quit her job several months before the expected birth of her child and prohibited her return to work until three months after childbirth violated the Fourteenth Amendment. Noting that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause," 414 U. S., at 639, the Court held that the Constitution required a more individualized approach to the question of the teacher's physical capacity to continue her employment during pregnancy and resume her duties after childbirth since "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." *Id.*, at 645.

It cannot be doubted that a substantial number of women are fully capable of working well into their last trimester of pregnancy and of resuming employment shortly after childbirth. In this very case Mrs. Turner was employed intermittently as a clerical worker for portions of the 18-week period during which she was conclusively presumed to be incapacitated. The Fourteenth Amendment requires that unemployment compensation boards no less than school boards must achieve legitimate state ends through more individualized means when basic human liberties are at stake. We conclude that the Utah unemployment compensation statute's incorporation of a conclusive presumption of incapacity during so long a period before and after childbirth is constitutionally invalid under the principles of the *LaFleur* case.

Accordingly, the writ of certiorari is granted, the judgment is vacated, and the case is remanded to the Supreme Court of Utah for further proceedings not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN would not summarily vacate the judgment of the Supreme Court of Utah. Instead, they would grant certiorari and set the case for full briefing and oral argument.

MR. JUSTICE REHNQUIST dissents.

ROSE, WARDEN *v.* LOCKE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74–1451. Decided November 17, 1975

Tennessee statute proscribing "crime against nature" *held* not unconstitutionally vague as applied to cunnilingus, satisfying as it does the due process standard of giving sufficient warning that men may so conduct themselves as to avoid that which is forbidden. Viewed against that standard, the challenged statutory phrase is no vaguer than many other terms describing criminal offenses at common law, which are now codified in criminal codes. Moreover, the Tennessee Supreme Court by previously rejecting claims that the statute was to be narrowly applied has given sufficiently clear notice that it would be held applicable to acts such as those involved here when such a case as this arose. *Wainwright* v. *Stone*, 414 U. S. 21, and *Bouie* v. *City of Columbia*, 378 U. S. 347, distinguished.

Certiorari granted; 514 F. 2d 570, reversed.

PER CURIAM.

Respondent was convicted in the Criminal Court for Knox County, Tenn., of having committed a "crime against nature" in violation of Tenn. Code Ann. § 39–707 (1955).[1] The evidence showed that he had entered the apartment of a female neighbor late at night on the pretext of using the telephone. Once inside, he produced a butcher knife, forced his neighbor to partially disrobe, and compelled her to submit to his twice performing cunnilingus upon her. He was sentenced to five to seven years' imprisonment. The Tennessee Court of Criminal Appeals affirmed the conviction, rejecting respondent's

[1] "39–707. Crimes against nature—Penalty.—Crimes against nature, either with mankind or any beast, are punishable by imprisonment in the penitentiary not less than five (5) years nor more than fifteen (15) years."

claim that the Tennessee statute's proscription of "crimes against nature" did not encompass cunnilingus, as well as his contention that the statute was unconstitutionally vague. 501 S. W. 2d 826 (1973). The Supreme Court of Tennessee denied review.

Respondent renewed his constitutional claim in a petition for a writ of habeas corpus filed in the District Court for the Eastern District of Tennessee.[2] The District Court denied respondent's petition, holding that when considered in light of previous interpretations by the courts of Tennessee, § 39–707 was "not unconstitutionally vague nor impermissibly overbroad."

Respondent appealed to the Court of Appeals for the Sixth Circuit, and that court sustained his constitutional challenge. Believing that the statutory term "crimes against nature" could not "in and of itself withstand a charge of unconstitutional vagueness" and being unable to find any Tennessee opinion previously applying the statute to the act of cunnilingus, the Court of Appeals held that the statute failed to give respondent "fair warning." 514 F. 2d 570 (1975).

It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual "criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954); see *Wainwright* v. *Stone*, 414 U. S. 21, 22 (1973). But this prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many

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[2] Respondent also sought relief on the theory that he was denied due process of law because he was convicted on the uncorroborated testimony of his victim. The District Court dismissed this ground as failing "to state a claim of constitutional significance," and respondent does not appear to have pursued it.

statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." *Robinson* v. *United States,* 324 U. S. 282, 286 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. Cf. *Nash* v. *United States,* 229 U. S. 373 (1913); *United States* v. *National Dairy Corp.,* 372 U. S. 29 (1963). All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden.[3]

Viewed against this standard, the phrase "crimes against nature" is no more vague than many other terms used to describe criminal offenses at common law and now codified in state and federal penal codes. The phrase has been in use among English-speaking people for many centuries, see 4 W. Blackstone, Commentaries *216, and a substantial number of jurisdictions in this country continue to utilize it. See Note, The Crimes Against Nature, 16 J. Pub. L. 159, 162 n. 19 (1967). Anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature, and there can be no contention that the respondent's acts were ones never before considered as such. See, *e. g.*, *Comer* v. *State,* 21 Ga. App. 306, 94 S. E. 314 (1917); *State* v. *Townsend,* 145 Me. 384, 71 A. 2d 517 (1950).

Respondent argued that the vice in the Tennessee statute derives from the fact that jurisdictions differ as to whether "crime against nature" is to be narrowly applied to only those acts constituting the common-law offense

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[3] This is not a case in which the statute threatens a fundamental right such as freedom of speech so as to call for any special judicial scrutiny, see *Smith* v. *Goguen,* 415 U. S. 566, 572–573 (1974).

of sodomy, or is to be broadly interpreted to encompass additional forms of sexual aberration. We do not understand him to contend that the broad interpretation is itself impermissibly vague; nor do we think he could successfully do so. We have twice before upheld statutes against similar challenges. In *State* v. *Crawford,* 478 S. W. 2d 314 (1972), the Supreme Court of Missouri rejected a claim that its crime-against-nature statute was so devoid of definition as to be unconstitutional, pointing out that its provision was derived from early English law and broadly embraced sodomy, bestiality, buggery, fellatio, and cunnilingus within its terms. We dismissed the appeal from this judgment as failing to present a substantial federal question. *Crawford* v. *Missouri,* 409 U. S. 811 (1972); see *Hicks* v. *Miranda,* 422 U. S. 332, 343–345 (1975). And in *Wainwright* v. *Stone, supra,* we held that a Florida statute proscribing "the abominable and detestable crime against nature" was not unconstitutionally vague, despite the fact that the State Supreme Court had recently changed its mind about the statute's permissible scope.

The Court of Appeals, relying on language in *Stone,* apparently believed these cases turned upon the fact that the state courts had previously construed their statutes to cover the same acts with which the defendants therein were charged. But although *Stone* demonstrated that the existence of previous applications of a particular statute to one set of facts forecloses lack-of-fair-warning challenges to subsequent prosecutions of factually identical conduct, it did not hold that such applications were a prerequisite to a statute's withstanding constitutional attack. If that were the case it would be extremely difficult ever to mount an effective prosecution based upon the broader of two reasonable constructions of newly enacted or previously unapplied statutes, even

though a neighboring jurisdiction had been applying the broader construction of its identically worded provision for years.

Respondent seems to argue instead that because some jurisdictions have taken a narrow view of "crime against nature" and some a broader interpretation, it could not be determined which approach Tennessee would take, making it therefore impossible for him to know if § 39–707 covered forced cunnilingus. But even assuming the correctness of such an argument if there were no indication which interpretation Tennessee might adopt, it is not available here. Respondent is simply mistaken in his view of Tennessee law. As early as 1955 Tennessee had expressly rejected a claim that "crime against nature" did not cover fellatio, repudiating those jurisdictions which had taken a "narrow restrictive definition of the offense." *Fisher* v. *State,* 197 Tenn. 594, 277 S. W. 2d 340. And four years later the Tennessee Supreme Court reiterated its view of the coverage intended by § 39–707. Emphasizing that the Tennessee statute's proscription encompasses the broad meaning, the court quoted from a Maine decision it had earlier cited with approval to the effect that " 'the prohibition brings all unnatural copulation with mankind or a beast, including sodomy, within its scope.' " *Sherrill* v. *State,* 204 Tenn. 427, 429, 321 S. W. 2d 811, 812 (1959), quoting from *State* v. *Cyr,* 135 Me. 513, 198 A. 743 (1938). And the Maine statute, which the Tennessee court had at that point twice equated with its own, had been applied to cunnilingus before either Tennessee decision. *State* v. *Townsend, supra.* Thus, we think the Tennessee Supreme Court had given sufficiently clear notice that § 39–707 would receive the broader of two plausible interpretations, and would be applied to acts such as those committed here when such a case arose.

This also serves to distinguish this case from *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), a decision the Court of Appeals thought controlling. In *Bouie*, the Court held that an unforeseeable judicial enlargement of a criminal statute narrow and precise on its face violated the Due Process Clause. It pointed out that such a process may lull "the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction." 378 U. S., at 352. But as we have noted, respondent can make no claim that § 39–707 afforded no notice that his conduct might be within its scope. Other jurisdictions had already reasonably construed identical statutory language to apply to such acts. And given the Tennessee court's clear pronouncements that its statute was intended to effect broad coverage, there was nothing to indicate, clearly or otherwise, that respondent's acts were outside the scope of § 39–707. There is no possibility of retroactive lawmaking here. See 378 U. S., at 353–354. Accordingly, the petition for certiorari and respondent's motion to proceed *in forma pauperis* are granted, and the judgment of the Court of Appeals is reversed.

So ordered.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I dissent from the Court's summary reversal. The offense of "crimes against nature" at common law was narrowly limited to copulation *per anum*. American jurisdictions, however, expanded the term—some broadly and some narrowly—to include other sexual "aberrations." Of particular significance for this case, as the Court of Appeals accurately stated, "courts have differed widely

in construing the reach of 'crimes against nature' to cunnilingus." 514 F. 2d 570, 571.

The Court holds, however, that because "[o]ther jurisdictions had already reasonably construed identical statutory language to apply to [cunnilingus] . . . given the Tennessee court's clear pronouncements that its statute was intended to effect broad coverage, there was nothing to indicate, clearly or otherwise, that respondent's acts were outside the scope of § 39–707." *Ante,* at 53. In other words the traditional test of vagueness—whether the statute gives fair warning that one's conduct is criminal—is supplanted by a test of whether there is anything in the statute "to indicate, clearly or otherwise, that respondent's acts were outside the scope of" the statute. This stands the test of unconstitutional vagueness on its head. And this startling change in vagueness law is accompanied by the equally startling holding that, although the Tennessee courts had not previously construed "crimes against nature" to include cunnilingus, respondent cannot be heard to claim that § 39–707 therefore afforded no notice that his conduct fell within its scope, because he was on notice that Tennessee courts favored a broad reach of "crimes against nature" and other state courts favoring a broad reach had construed their state statutes to include cunnilingus.

Yet these extraordinary distortions of the principle that the Due Process Clause prohibits the States from holding an individual criminally responsible for conduct when the statute did not give fair warning that the conduct was criminal, are perpetrated without plenary review affording the parties an opportunity to brief and argue the issues orally. It is difficult to recall a more patent instance of judicial irresponsibility. For without plenary review the Court announces today, contrary to our prior decisions, that even when the statute he is

charged with violating fails of itself to give fair warning, one acts at his peril if the state court has indicated a tendency to construe the pertinent statute broadly, and some other state court of like persuasion has construed its state statute to embrace the conduct made the subject of the charge. I simply cannot comprehend how the fact that one state court has judicially construed its otherwise vague criminal statute to include particular conduct can, without explicit adoption of that state court's construction by the courts of the charging State, render an uninterpreted statute of the latter State also sufficiently concrete to withstand a charge of unconstitutional vagueness. But apart from the merits of the proposition, surely the citizens of this country are entitled to plenary review of its soundness before being required to attempt to conform their conduct to this drastically new standard. Today's holding surely flies in the face of the line of our recent decisions that have struck down statutes as vague and overbroad, although other state courts had previously construed their like statutes to withstand challenges of vagueness and overbreadth. See, *e. g.,* the "abusive language" decisions of which *Gooding* v. *Wilson,* 405 U. S. 518 (1972), is illustrative.

Nor will the Court's assertions that the Tennessee courts had in any event in effect construed the Tennessee statute to include cunnilingus withstand analysis. The Court relies on a 1955 Tennessee decision that had held that "crimes against nature" include fellatio, the Tennessee court rejecting the contention that the statute was limited to the common-law copulation-*per-anum* scope of the phrase. The Tennessee court in that opinion cited a Maine case, decided in 1938, *State* v. *Cyr,* 135 Me. 513, 198 A. 743, where the Maine court had applied a "crimes against nature" statute to fellatio.

But the Tennessee court did not also cite a 1950 Maine decision, *State* v. *Townsend,* 145 Me. 384, 71 A. 2d 517, that applied Maine's "crimes against nature" statute to cunnilingus. *Fisher* v. *State,* 197 Tenn. 594, 277 S. W. 2d 340 (1955). Four years later, in 1959, in another fellatio case, the Tennessee court again made no mention of *Townsend,* although quoting from *Cyr*'s holding that the Maine statute applies to " 'all unnatural copulation with mankind or a beast, including sodomy.' " *Sherrill* v. *State,* 204 Tenn. 427, 429, 321 S. W. 2d 811, 812 (1959). Despite this significant failure of the Tennessee court to cite *Townsend,* and solely on the strength of the Tennessee court's general "equating" of the Maine statute with the Tennessee statute, this Court holds today that respondent had sufficient notice that the Tennessee statute would receive a "broad" interpretation that would embrace cunnilingus.

This 1974 attempt to bootstrap 1950 Maine law for the first time into the Tennessee statute must obviously fail if the principle of fair warning is to have any meaning. When the Maine court in 1938 applied its statute broadly to all "unnatural copulation," nothing said by the Maine court suggested that that phrase reached cunnilingus. The common-law "crime against nature," limited to copulation *per anum,* required penetration as an essential element. In holding that a "broad" reading of that phrase should encompass all unnatural copulation including fellatio—copulation *per os*—Maine could not reasonably be understood as including cunnilingus in that category. Other jurisdictions, though on their State's particular statutory language, have drawn that distinction. See, *e. g., Riley* v. *Garrett,* 219 Ga. 345, 133 S. E. 2d 367 (1963); *State* v. *Tarrant,* 83 Ohio App. 199, 80 N. E. 2d 509 (1948). Thus, when the Tennessee court in 1955 adopted the language of Maine's 1938 *Cyr*

case, a Tennessee citizen had at most notice of developments in Maine law through 1938. That Maine subsequently in 1950 applied its statute to cunnilingus is irrelevant, for such subsequent developments were not "adopted" by the Tennessee court until the case before us. Indeed, the Tennessee court's failure in its 1955 *Fisher* opinion to cite *Townsend,* Maine's 1950 cunnilingus decision, although citing *Cyr,* Maine's 1938 fellatio decision, more arguably was notice that the Tennessee courts considered fellatio but not cunnilingus as within the nebulous reach of the Tennessee statute.

Moreover, I seriously question the Court's assumption that the "broad interpretation" of the phrase "crime against nature" is not unconstitutionally vague. The Court's assumption rests upon two supposed precedents: (1) this Court's dismissal for want of a substantial federal question of the appeal in *Crawford* v. *Missouri,* 409 U. S. 811 (1972), and (2) the Court's *per curiam* opinion in *Wainwright* v. *Stone,* 414 U. S. 21 (1973). That reliance is plainly misplaced.

In *Crawford,* the appellant had been convicted of coercing a mentally retarded individual to perform fellatio on appellant. The Supreme Court of Missouri did not, as the Court implies, for the first time in that case adopt a "broad" construction of its statute and apply that construction in appellant's case. Rather, the Supreme Court of Missouri first noted that the original statute, probably reaching only the common-law "crime against nature," had been legislatively amended in express terms to expand the offense to conduct committed "with the sexual organs or with the mouth," thereby "enlarg[ing] the common law definition of the crime . . . ." *State* v. *Crawford,* 478 S. W. 2d 314, 317 (Mo. 1972). Moreover, the court, observing that a "court's construction of statutory language becomes a part of the statute

'as if it had been so amended by the legislature,'" *ibid.* (citations omitted), stated that in the 60 years since that amendment, the Missouri courts had "adjudicated" that the statute embraced "bestiality, buggery, fellatio . . . and cunnilingus," *id.*, at 318, and that "[a]t least five [Missouri] cases have specifically held that the act charged [against appellant] is within the statute." *Id.*, at 319. In light of that prior judicial and legislative construction of the statutory phrase, and its specific prior application to acts identical to the appellant's, the dismissal in *Crawford* simply cannot be treated as holding that the phrase "crime against nature" is not in itself vague.

Wainwright v. *Stone*, as MR. JUSTICE STEWART correctly observes, also involved a statute already construed to cover the conduct there in question. Indeed, it was for that very reason that we held that the "judgment of federal courts as to the vagueness or not of a state statute must be made in the light of prior state constructions of the statute." 414 U. S., at 22. The reversal of the Court of Appeals' holding finding the statute unconstitutional was explicitly based on the fact that the state statute had previously been applied to identical conduct, which decisions "require[d] reversal" in *Wainwright* since they put the particular conduct expressly within the statute. *Id.*, at 22–23.*

*Admittedly, as the Court notes, a holding that prior application of a statute to identical conduct renders a statute sufficiently definite as to that conduct does not necessarily mean that in the absence of such prior application a statute must of necessity be deemed vague; but such a holding just as surely cannot be construed, as it is by the Court, as precedent deciding that in the absence of such construction, the phrase "crime against nature" is *not* unconstitutionally vague. In any event, *Wainwright* and *Crawford* present the identical situation, namely vague statutes judicially construed to narrow them.

No specter of increasing caseload can possibly justify today's summary disposition of this case. The principle that due process requires that criminal statutes give sufficient warning to enable men to conform their conduct to avoid that which is forbidden is one of the great bulwarks of our scheme of constitutional liberty. The Court's erosion today of that great principle without even plenary review reaches a dangerous level of judicial irresponsibility. I would have denied the petition for certiorari, but now that the writ has been granted would affirm the judgment of the Court of Appeals or at least set the case for oral argument.

MR. JUSTICE STEWART, with whom MR. JUSTICE MARSHALL concurs, dissenting.

I would have denied the petition for certiorari in this case, but, now that the writ has been granted, I would affirm the judgment of the Court of Appeals.

This case is not of a piece with *Wainwright* v. *Stone*, 414 U. S. 21, upon which the Court so heavily relies. There the Florida courts had repeatedly and explicitly ruled that the state law in question prohibited precisely the conduct in which the defendants were found to have engaged. Here, by contrast, the Tennessee courts had never ruled that the act that Locke was found to have committed was covered by the vague and cryptic language of the Tennessee statute, Tenn. Code Ann. § 39–707. The Court today emphasizes that a previous Tennessee court opinion had cited a decision of a Maine court construing a similar statute "broadly," but even the cited Maine decision had not construed the statute to cover the conduct in question here. And a later Tennessee decision would have supported the inference that this conduct was *not* proscribed by the Tennessee statute. *Stephens* v. *State*, 489 S. W. 2d 542 (1972).

In the *Stone* case, *supra*, the Florida statute had "been construed to forbid identifiable conduct so that 'interpretation by [the state court] puts these words in the statute as definitely as if it had been so amended by the legislature . . . .'" 414 U. S., at 23. In the present case, by contrast, the state courts had never held that the statutory language here at issue covered the respondent's conduct.

As the Court of Appeals pointed out, the respondent in this case could, and probably should, be prosecuted for aggravated assault and battery. But I think the Court of Appeals was correct in holding that the Tennessee statute under which the defendant was in fact prosecuted was unconstitutionally vague as here applied.

MENNA *v.* NEW YORK

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 75-5401. Decided November 17, 1975

Petitioner's guilty plea to a charge of refusal to answer questions before a grand jury after having been granted immunity *held* not to bar his claim that the Double Jeopardy Clause precluded the State from haling him into court on that charge after he had been sentenced to a jail term for contempt of court for his failure to testify before the grand jury.

Certiorari granted; 36 N. Y. 2d 930, 335 N. E. 2d 848, reversed and remanded.

PER CURIAM.

On November 7, 1968, after having been granted immunity, petitioner refused to answer questions put to him before a duly convened Kings County, N. Y., grand jury which was investigating a murder conspiracy. On March 18, 1969, petitioner refused to obey a court order to return to testify before the same grand jury in connection with the same investigation. On that date, petitioner was adjudicated in contempt of court under N. Y. Jud. Law § 750 (1968) for his failure to testify before the grand jury; and, on March 21, 1969, after declining an offer to purge his contempt, petitioner was sentenced to a flat 30-day term in civil jail. Petitioner served his sentence.

On June 10, 1970, petitioner was indicted for his refusal to answer questions before the grand jury on November 7, 1968. After asserting unsuccessfully that this indictment should be dismissed under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, petitioner pleaded guilty to the indictment and was sentenced on his plea.

Petitioner appealed, claiming that the Double Jeopardy Clause precluded the State from haling him into court on the charge to which he had pleaded guilty.[1] The New York Court of Appeals affirmed the conviction, declining to address the double jeopardy claim on the merits. It held, relying, *inter alia*, on *Tollett* v. *Henderson*, 411 U. S. 258 (1973), that the double jeopardy claim had been "waived" by petitioner's counseled plea of guilty.

We reverse. Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge* v. *Perry*, 417 U. S. 21, 30 (1974).[2] The motion

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[1] The State concedes that petitioner's double jeopardy claim is a strong one on the merits. In light of the flat 30-day sentence imposed, the earlier contempt adjudication was a criminal conviction, *People* v. *Colombo*, 31 N. Y. 2d 947, 293 N. E. 2d 247 (1972), on remand from *Colombo* v. *New York*, 405 U. S. 9 (1972), and New York law supports the proposition that the earlier conviction was based, at least in part, on the failure to answer questions on November 7, 1968, and was thus for the same crime as the one charged in the instant indictment. *In re Capio* v. *Justices of the Supreme Court*, 41 App. Div. 2d 235, 342 N. Y. S. 2d 100 (1973), aff'd, 34 N. Y. 2d 603, 310 N. E. 2d 547 (1974); *People* v. *Matra*, 42 App. Div. 2d 865, 346 N. Y. S. 2d 872 (1973).

[2] Neither *Tollett* v. *Henderson*, 411 U. S. 258 (1973), nor our earlier cases on which it relied, *e. g.*, *Brady* v. *United States*, 397 U. S. 742 (1970), and *McMann* v. *Richardson*, 397 U. S. 759 (1970), stand for the proposition that counseled guilty pleas inevitably "waive" all antecedent constitutional violations. If they did so hold, the New York Court of Appeals might be correct. However, in *Tollett* we emphasized that waiver was not the basic ingredient of this line of cases, 411 U. S., at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is

for leave to proceed *in forma pauperis* and the petition for certiorari are granted, and the case is remanded to the New York Court of Appeals for a determination of petitioner's double jeopardy claim on the merits, a claim on which we express no view.

So ordered.

MR. JUSTICE BRENNAN agrees that "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty," *ante,* at 62, but on his view that the Double Jeopardy Clause bars the prosecution from mounting successive prosecutions for offenses growing out of the same criminal transaction, he believes that the proper disposition of the case is not a remand but outright reversal. See *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring).

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST would grant the petition for a writ of certiorari and set the case for oral argument.

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a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. Here, however, the claim is that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim.

We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute.

DILLINGHAM *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–6738. Decided December 1, 1975

A 22-month delay between petitioner's arrest and indictment for federal offenses *held* required to be counted in assessing his claim that he was denied a speedy trial in violation of the Sixth Amendment. *United States* v. *Marion*, 404 U. S. 307, distinguished.

Certiorari granted; 502 F. 2d 1233, reversed and remanded.

PER CURIAM.

An interval of 22 months elapsed between petitioner's arrest and indictment, and a further period of 12 months between his indictment and trial, upon charges of automobile theft in violation of 18 U. S. C. §§ 371, 2312, and 2313. The District Court for the Northern District of Georgia denied petitioner's motions—made immediately after arraignment and posttrial—to dismiss the indictment on the ground that petitioner had been denied a speedy trial in violation of the Sixth Amendment. The Court of Appeals for the Fifth Circuit affirmed, holding that under *United States* v. *Marion*, 404 U. S. 307 (1971), the 22-month "pre-indictment delay . . . is not to be counted for the purposes of a Sixth Amendment motion absent a showing of actual prejudice." 502 F. 2d 1233, 1235 (1974). This reading of *Marion* was incorrect. *Marion* presented the question whether in assessing a denial of speedy trial claim, there was to be counted a delay between the end of the criminal scheme charged and the indictment of a suspect not arrested or otherwise charged previous to the indictment. The Court held: "On its face, the protection of the [Sixth] Amendment is activated only when a criminal prosecution has begun and extends only to those persons

who have been 'accused' in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time." 404 U. S., at 313. In contrast, the Government constituted petitioner an "accused" when it arrested him and thereby commenced its prosecution of him. *Marion* made this clear, *id.*, at 320–321, where the Court stated:

> "To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer* v. *North Carolina,* [386 U. S. 213 (1967)]; see also *Smith* v. *Hooey,* 393 U. S. 374, 377–378 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
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> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge."

See also *Barker* v. *Wingo,* 407 U. S. 514, 519–520, 532–533 (1972).*

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*The Memorandum for the United States in Opposition, p. 4, states that "*Marion* appears to leave little doubt . . . that [the

Petitioner's motion to proceed *in forma pauperis* and the petition for certiorari are granted. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

THE CHIEF JUSTICE dissents.

Court] believed that the policies that inform the right to a speedy trial reach beyond the indictment stage of criminal proceedings and that the right consequently attaches either at the point at which a person is arrested and held to answer on a criminal charge or when he is formally charged by indictment or information, whichever occurs earlier . . . ." Accord, *United States* v. *Macino*, 486 F. 2d 750 (CA7 1973); *United States* v. *Cabral*, 475 F. 2d 715 (CA1 1973); *Edmaiston* v. *Neil*, 452 F. 2d 494 (CA6 1971).

TEXAS *v.* WHITE

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 75–124. Decided December 1, 1975

Where police officers had probable cause to search respondent's automobile at the scene immediately after arresting him for attempting to pass fraudulent checks at a bank drive-in window, such probable cause still obtained shortly thereafter at the station house to which the automobile had been taken so that the officers could constitutionally search the automobile there without a warrant, *Chambers* v. *Maroney*, 399 U. S. 42; hence incriminating checks seized during the search were admissible in evidence at respondent's trial.

Certiorari granted; 521 S. W. 2d 255, reversed and remanded.

PER CURIAM.

Respondent was arrested at 1:30 p. m. by Amarillo, Tex., police officers while attempting to pass fraudulent checks at a drive-in window of the First National Bank of Amarillo. Only 10 minutes earlier, the officers had been informed by another bank that a man answering respondent's description and driving an automobile exactly matching that of respondent had tried to negotiate four checks drawn on a nonexistent account. Upon arrival at the First National Bank pursuant to a telephone call from that bank, the officers obtained from the drive-in teller other checks that respondent had attempted to pass there. The officers directed respondent to park his automobile at the curb. While parking the car, respondent was observed by a bank employee and one of the officers attempting to "stuff" something between the seats. Respondent was arrested and one officer drove him to the station house while the other drove respondent's car there. At the station house, the

officers questioned respondent for 30 to 45 minutes and, pursuant to their normal procedure, requested consent to search the automobile. Respondent refused to consent to the search. The officers then proceeded to search the automobile anyway. During the search, an officer discovered four wrinkled checks that corresponded to those respondent had attempted to pass at the first bank. The trial judge, relying on *Chambers* v. *Maroney,* 399 U. S. 42 (1970), admitted over respondent's objection the four checks seized during the search of respondent's automobile at the station house. The judge expressly found probable cause both for the arrest and for the search of the vehicle, either at the scene or at the station house. Respondent was convicted after a jury trial of knowingly attempting to pass a forged instrument. The Texas Court of Criminal Appeals, in a 3–2 decision, reversed respondent's conviction on the ground that the four wrinkled checks used in evidence were obtained without a warrant in violation of respondent's Fourth Amendment rights. 521 S. W. 2d 255 (1975). We reverse.

In *Chambers* v. *Maroney* we held that police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant. There, as here, "[t]he probable-cause factor" that developed at the scene "still obtained at the station house." 399 U. S., at 52. The Court of Criminal Appeals erroneously excluded the evidence seized from the search at the station house in light of the trial judge's finding, undisturbed by the appellate court, that there was probable cause to search respondent's car.

The petition for certiorari and the motion of respondent to proceed *in forma pauperis* are granted, the judgment of the Court of Criminal Appeals is reversed, and

the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Only by misstating the holding of *Chambers* v. *Maroney,* 399 U. S. 42 (1970), can the Court make that case appear dispositive of this one. The Court in its brief *per curiam* opinion today extends *Chambers* to a clearly distinguishable factual setting, without having afforded the opportunity for full briefing and oral argument. I respectfully dissent.

Chambers did not hold, as the Court suggests, that "police officers with probable cause to search an automobile at the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant." *Ante,* at 68. *Chambers* simply held that to be the rule when it is reasonable to take the car to the station house in the first place.

In *Chambers* the Court took as its departure point this Court's holding in *Carroll* v. *United States,* 267 U. S. 132 (1925):

> "*Carroll* . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. Hence an immediate search is constitutionally permissible." 399 U. S., at 51.

Carroll, however, did not dispose of *Chambers,* for in *Chambers,* as in this case, the police did not conduct an "immediate search," but rather seized the car and took it to the station house before searching it. The Court in *Chambers* went on to hold that once the car was

legitimately at the station house a prompt search could be conducted. But in recognition of the need to justify the seizure and removal of the car to the station house, the Court added:

> "It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house." *Id.*, at 52 n. 10.

In this case, the arrest took place at 1:30 in the afternoon, and there is no indication that an immediate search would have been either impractical or unsafe for the arresting officers. It may be, of course, that respondent preferred to have his car brought to the station house, but if his convenience was the concern of the police they should have consulted with him. Surely a seizure cannot be justified on the sole ground that a citizen might have consented to it as a matter of convenience. Since, then, there was no apparent justification for the warrantless removal of respondent's car, it is clear that this is a different case from *Chambers*.

It might be argued that the taking of respondent's car to the police station was neither more of a seizure, nor in practical terms more of an intrusion, than would have been involved in an immediate at-the-scene search, which was clearly permissible. Such a contention may well be substantial enough to warrant full briefing and argument, but it is not so clearly meritorious as to warrant adoption in the summary fashion in which the Court proceeds. Indeed, a reading of *Chambers* itself suggests that this contention is without merit.

In *Chambers* the Court considered and rejected the argument that *Carroll* was wrong in permitting a warrantless search of an automobile—that the immobilization of a car until a search warrant is obtained is a "lesser" intrusion and should therefore be the outer bounds of what is permitted. The Court noted that "which is the 'greater' and which the 'lesser' intrusion is itself a debatable question," 399 U. S., at 51, and concluded:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *Id.*, at 52.

In the Court's view, then, the intrusion involved in initially seizing a car on the highway and holding it for the short time required to seek a warrant is so substantial as to be constitutionally indistinguishable from the intrusion involved in a search of the vehicle. But the Court did not stop with that observation. It went on to note that once a car is legitimately brought to the station house, the *additional* intrusion involved in simply immobilizing the car until a warrant can be sought is no less significant than that involved in a station house search: "[T]here is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." *Ibid.* It was because such temporary seizures were deemed no less intrusive than searches themselves that *Chambers* approved searches when temporary seizures would have been justified.

In short, the basic premise of *Chambers'* conclusion that seizures pending the seeking of a warrant are not constitutionally preferred to warrantless

searches was that temporary seizures are themselves intrusive. That same premise suggests that the seizure and removal of respondent's car in this case were quite apart from the subsequent search, an intrusion of constitutional dimension that must be independently justified.* The seizure and removal here were not for the purpose of immobilizing the car until a warrant could be secured, nor were they for the purpose of facilitating a safe and thorough search of the car. In the absence of any other justification, I would hold the seizure of petitioner's car unlawful and exclude the evidence seized in the subsequent search.

I would have denied the petition for certiorari, but now that the writ has been granted I would affirm the judgment of the Court of Criminal Appeals, or at least set the case for oral argument. In any event, it should be clear to the court below that nothing this Court does today precludes it from reaching the result it did under applicable state law. See *Oregon* v. *Hass*, 420 U. S. 714, 726 (1975) (MARSHALL, J., dissenting).

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*One might argue that respondent's car was seized and held for a shorter period of time than would be required to ask a magistrate for a warrant, and that the intrusion here is therefore of less significance than the intrusions referred to in *Chambers*. But *Chambers* took such time elements out of the equation. While recognizing that the relative intrusiveness of an immediate search and a seizure pending the seeking of a warrant would depend on "a variety of circumstances," 399 U. S., at 51–52, the Court preferred the predictability of a general rule "equating" the intrusiveness of a search and a relatively brief seizure. Having chosen such a general rule, the Court should follow it to its logical conclusion.

BRAY *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 75-5182. Decided December 1, 1975

Petitioner's conviction of criminal contempt under 18 U. S. C. § 401 for refusing to testify and to produce business records subpoenaed by the Internal Revenue Service in connection with an inquiry into possible violations of the Economic Stabilization Act of 1970 (Act) was a final decision of the District Court appealable to the Court of Appeals, and petitioner's appeal was not within the exclusive jurisdiction of the Temporary Emergency Court of Appeals (TECA). Rather than "arising under" the Act within the meaning of § 211 (b)(2) thereof vesting the TECA with exclusive jurisdiction of all appeals from district courts "in cases and controversies arising under" the Act, the criminal contempt charge initiated a separate and independent proceeding under the Criminal Code, which, although related to an order entered in connection with an investigation of Act violations, did not depend on the existence of such violations or even the continuance of the investigation.

Certiorari granted; — F. 2d —, vacated and remanded.

PER CURIAM.

On June 25, 1973, the Internal Revenue Service (IRS) served a subpoena on the petitioner, Karl J. Bray, directing him to produce business records for examination and to appear for questioning in connection with an inquiry into possible violations of the Economic Stabilization Act of 1970, 84 Stat. 799, as amended, 85 Stat. 743, note following 12 U. S. C. § 1904 (1970 ed., Supp. III). When he failed to comply, the IRS filed a petition for enforcement of the subpoena in the United States District Court for the District of Utah. Following a hearing, the District Court ordered him to comply with the subpoena. Upon his refusal to testify or pro-

duce the records, the court directed him to show cause why he should not be held in criminal contempt. He was subsequently convicted of criminal contempt under 18 U. S. C. § 401 and sentenced to imprisonment for 60 days.[1] He appealed the judgment of conviction to the United States Court of Appeals for the Tenth Circuit, but that court dismissed the appeal for want of jurisdiction, holding that the appeal came within the exclusive jurisdiction conferred upon the Temporary Emergency Court of Appeals (TECA) by § 211 (b)(2) of the Economic Stabilization Act. This petition for certiorari asks us to review the propriety of the dismissal of Bray's appeal.

As part of the Economic Stabilization Act Amendments of 1971, Congress created the TECA and vested it with "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder." § 211 (b)(2), 85 Stat. 749. This judicial-review provision was designed to provide speedy resolution of cases brought under the Act and "to funnel into one court all the appeals arising out of the District Courts and thus gain in consistency of decision." S. Rep. No. 92–507, p. 10 (1971). The provision thus carved out a limited exception to the broad jurisdiction of the courts of appeals over "appeals from all final decisions of the district courts of the United States." 28 U. S. C. § 1291.

The Tenth Circuit held that, "notwithstanding Bray's prosecution under 18 U. S. C. [§] 401," the contempt charge did not "change the substantive nature of the original enforcement proceedings" and therefore remained "a 'case or controversy' arising under the [Economic

[1] The District Court stayed execution of the judgment pending appeal.

Stabilization] Act." This was, we think, a misreading of both the language and the purpose of the stabilization statute. The Act does not contain any provision prohibiting the violation of a district court's enforcement order or establishing penalties for such a violation. Thus, rather than "arising under" any provision of the Act, the contempt prosecution was commenced under 18 U. S. C. § 401, the provision of the Criminal Code that empowers federal courts to punish certain contempts of their authority. Nothing in the Act or in its legislative history indicates that Congress intended "to include existing offenses, already covered under Title 18, under the umbrella of the Stabilization Act." *United States* v. *Cooper,* 482 F. 2d 1393, 1398 (TECA 1973).[2] Review in the TECA of criminal contempt convictions relating to compliance investigations or enforcement efforts is not necessary to assure uniform interpretation of the substantive provisions of the stabilization scheme. Indeed, a requirement of such review would only serve to undermine the prompt resolution of Stabilization Act questions by burdening the TECA with additional appeals.

The charge brought against the petitioner based on his refusal to obey a lawful order of the District Court initiated "a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court" and was "not a part of the original cause." *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 445, 451. Although the contempt charge related to an order

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[2] In *Cooper,* the TECA held that a prosecution under 18 U. S. C. § 1001 for willfully and knowingly making false representations to an IRS agent in connection with a Stabilization Act investigation was not "a controversy 'arising under' any title of the Stabilization Act or under regulations or orders issued thereunder." 482 F. 2d, at 1397.

entered in connection with an investigation of Stabilization Act violations, it was not dependent on the existence of such violations or even the continuation of the investigation. As the Court noted in *United States* v. *United Mine Workers*, 330 U. S. 258, 294: "Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden* v. *Searls*, 121 U. S. 14 (1887), or though the basic action has become moot, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911)." Here the conviction and sentencing of the petitioner for criminal contempt constituted a final decision of the District Court that was then appealable to the appropriate court of appeals. We therefore grant the motion to proceed *in forma pauperis* and the petition for certiorari, vacate the judgment, and remand the case to the Court of Appeals for the Tenth Circuit for further proceedings consistent with this opinion.

UNITED STATES *v.* MOORE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 74–687. Argued October 15, 1975—Decided December 2, 1975

Obligations of an insolvent debtor arising from default in the performance of Government contracts, occurring before an assignment for the benefit of creditors *held* entitled to the statutory priority accorded "debts due to the United States" under 31 U. S. C. § 191, even though the obligations were unliquidated in amount at the time of the assignment. Pp. 80–86.

(a) Nothing on the face of § 191, and no potential difficulty in administering it, require any distinction between liquidated and unliquidated debts for purpose of the statutory priority; the statute's language looks to the time of payment rather than the time when the assignment is made. P. 83.

(b) To construe the words "debts due to the United States" as including unliquidated claims and as not being restricted to those obligations that would on the date of the assignment have given rise to a common-law action for debt, comports with the treatment of unliquidated claims in the Bankruptcy Acts, including the current Act. Pp. 83–85.

(c) The obligations in question were fixed and independent of "events after insolvency," and only the precise amount of those obligations awaited future events. Pp. 85–86.

497 F. 2d 976, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Harriet S. Shapiro argued the cause for the United States. On the briefs were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Gerald P. Norton, Robert E. Kopp,* and *Larry R. O'Neal.*

Thomas Osa Harris argued the cause and filed a brief for respondents.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether obligations of an insolvent debtor arising from default in the performance of Government contracts, occurring before an assignment for the benefit of creditors, are entitled to the statutory priority for "debts due to the United States" when the amount of the obligation was not fixed at the time of the assignment. We hold that the obligations, even though unliquidated in amount when the insolvent debtor made the assignment, are entitled to the statutory priority accorded debts due the United States under Rev. Stat. § 3466, 31 U. S. C. § 191, and we reverse.

(1)

The facts are not in dispute. In June 1966 respondent Emsco Screen and Pipe Company of Texas, Inc., contracted with the United States in three separate contracts to supply to the Navy, the Army, and the Defense Supply Agency certain fabricated items at an aggregate agreed price of $310,296. Emsco subsequently advised the Navy that it could not perform the contracts without an advance of money not yet due under the terms of the contracts; the Government was unwilling to make the advance. The Navy treated its contract as terminated on August 31, 1966. Emsco repudiated the Army contract, and the Army notified Emsco of its intent to treat the contract as terminated during the same month, although formal termination was not made until December 6, 1966. The Defense Supply Agency terminated its contract with Emsco on October 19, 1966, for failure to deliver.

Respondent Emsco made a voluntary assignment of all its assets, totaling $55,707.28, on October 20, 1966, to respondent Thomas W. Moore, Jr., as assignee for the

benefit of creditors. The company at that time owed the city of Houston approximately $6,000, and it owed more than $68,000 to the private creditors who consented to the assignment. Thus the claims of the private creditors alone exceeded all known corporate assets of the debtor.

The United States did not consent to the assignment, but filed proof of claims with the respondent Moore. The amount of the Government's claim, after reprocurement of the contract goods and negotiations with respondent Moore, was eventually set at $51,680, exclusive of interest. Respondent Moore refused to accord these claims priority under Rev. Stat. § 3466, 31 U. S. C. § 191, which provides:

> "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

The United States then sued respondents Moore and Emsco in District Court. That court found the amount owed under the three defaulted contracts to be in excess of $67,000, including interest, and held that § 3466 afforded priority status to them as "debts due to the United States."

The Court of Appeals reversed, with one judge dissenting, holding that the claims of the United States were not, at the time of the assignment for creditors, amounts

certain and then payable and hence not "debts due" entitled to statutory priority. 497 F. 2d 976 (CA5 1974). To define this term, the court looked to the limits of a common-law action for debt, which permitted recovery of only liquidated obligations—"sums certain or which could be made certain by mathematical computation." *Id.*, at 978. One judge concurred separately, concluding that to have priority the claim of the United States must be one ascertained in amount prior to assignment, by a tribunal having jurisdiction to bind the contracting parties. Judge Thornberry dissented; he relied on *King* v. *United States*, 379 U. S. 329 (1964), and other holdings to the effect that Congress intended to give special status and protection to claims of the Government and the statute was to be construed to accomplish that objective. *Small Business Administration* v. *McClellan*, 364 U. S. 446 (1960); *United States* v. *Emory*, 314 U. S. 423 (1941); *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483 (1926). The dissent viewed the existence of an obligation as determinative, even though the extent of the obligation was unliquidated at the time of the assignment.

(2)

The statute at issue is almost as old as the Constitution, and its roots reach back even further into the English common law; the Crown exercised a sovereign prerogative to require that debts owed it be paid before the debts owed other creditors. 3 R. Clark, Law of Receivers § 669, p. 1223 (3d ed. 1959). Many of the States claim the same prerogative, as an inherent incident of sovereignty. *Pauley* v. *California*, 75 F. 2d 120, 133 (CA9 1934); *People* v. *Farmers' State Bank*, 335 Ill. 617, 167 N. E. 804 (1929); *In re Carnegie Trust Co.*, 206 N. Y. 390, 99 N. E. 1096 (1912); *State* v. *Bank of Maryland*, 6 Gill & Johns. 205, 26 Am. Dec. 561 (Md.

1834). The Federal Government's claim to priority, however, rests as a matter of settled law only on statute. *Price* v. *United States,* 269 U. S. 492, 499–500 (1926); *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 35 (1832).

The earliest priority statute was enacted in the Act of July 31, 1789, 1 Stat. 29, which dealt with bonds posted by importers in lieu of payment of duties for release of imported goods. It provided that the "debt due to the United States" for such duties shall be discharged first "in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased . . . ." § 21, 1 Stat. 42. A 1792 enactment broadened the Act's coverage by providing that the language "cases of insolvency" should be taken to include cases in which a debtor makes a voluntary assignment for the benefit of creditors, and the other situations that § 3466, 31 U. S. C. § 191, now covers. 1 Stat. 263.

In 1797 Congress applied the priority to any "person hereafter becoming indebted to the United States, by bond or otherwise . . . ." 1 Stat. 515. Then in 1799, Congress gave the priority teeth by making the administrator of any insolvent or decedent's estate personally liable for any amount not paid the United States because he gave another creditor preference. Act of Mar. 2, 1799, 1 Stat. 627, 676. The 1797 and 1799 Acts have survived to this day essentially unchanged, as 31 U. S. C. §§ 191 and 192 (Rev. Stat. §§ 3466 and 3467).

The priority statute serves the same public policy as the Crown's common-law prerogative. As Mr. Justice Story wrote for the Court in 1832, the priority proceeds from "motives of public policy, in order to secure an adequate revenue to sustain the public burthens and discharge the public debts. . . . [A]s that policy has

mainly a reference to the public good, there is no reason for giving to [the statute] a strict and narrow interpretation." *United States* v. *State Bank of North Carolina, supra,* at 35. For nearly two centuries this Court has applied the statute with this policy in mind. In *State Bank* itself, 6 Pet., at 38, the Court rejected the bank's argument that bonds payable only in the future were not "debts due to the United States" because they were not presently payable, using language apt for today's case as well:

> "No reason can be perceived, why, in cases of a deficiency of assets of deceased persons, the legislature should make a distinction between bonds which should be payable at the time of their decease, and bonds which should become payable afterwards. The same public policy which would secure a priority of payment to the United States in one case, applies with equal force to the other; and an omission to provide for such priority in regard to bonds payable in futuro, would amount to an abandonment of all claims, except for a pro rata dividend. In cases of general assignments by debtors, there would be a still stronger reason against making a distinction between bonds then payable and bonds payable in futuro; for the debtor might, at his option, give any preferences to other creditors, and postpone the debts of the United States of the latter description, and even exclude them altogether."

For similar reasons, and using similar language, the courts have applied the priority statute to Government claims of all types. See 3A J. Moore & R. Oglebay, Collier on Bankruptcy ¶ 64.502 (14th ed. 1975); see also Plumb, The Federal Priority In Insolvency: Proposals for Reform, 70 Mich. L. Rev. 3, 10–12 (1971). Indeed, under the decisions of this Court, "[o]nly the plainest

inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." *United States* v. *Emory*, 314 U. S., at 433.

(3)

Respondent Moore argues that in this case we should read the statute narrowly, to accord priority only to those claims that are liquidated and certain in amount at the time an assignment for the benefit of creditors is made. Three factors lead us to a different result.

First, nothing on the face of the statute, and no potential difficulty in administering it, require that a distinction be drawn for this purpose between liquidated and unliquidated debts. The statute's express command is that "debts due the United States shall be first satisfied"; its language looks to the time of payment rather than the moment at which the assignment of obligations is made. Respondent Moore concedes here, as he has throughout this litigation, that the debt owed the United States is a valid claim against the debtor's assets; he argues only that the United States should be paid pro rata, as a general creditor. While the concession does not dispose of the case, it does dispose of any argument that giving priority to debts unliquidated at the time of assignment would unduly delay distribution of the debtor's estate, since payment pro rata would occasion a like delay. Moreover, if the claim can be paid on a pro rata basis, Congress could, as we hold it did in this statute, provide for priority payment.

Second, respondent Moore urges and the Court of Appeals held that the words "debts due to the United States" must be read to mean only those obligations that would on the date of the assignment have given rise to a common-law action for debt. But we see no persuasive reason why the technical requirements of a common-

law pleading should be read into the statute.[1] We look instead to the provisions of the several Bankruptcy Acts that Congress has enacted, as the Court has for the definition of other phrases used in the statute here at issue. See, *e. g., United States* v. *Oklahoma,* 261 U. S. 253 (1923); *United States* v. *Emory, supra,* at 426. The Bankruptcy Acts focus more precisely on the problems of insolvency and are more apt an analogy to a statute giving the United States priority in payments to be made from insolvents' estates.

The first Bankruptcy Act, passed in 1800, was a near contemporary of the priority statute. It permitted creditors to prove not only debts liquidated at the time of bankruptcy, but some other debts that became certain during the proceedings.[2] The debtor would receive a discharge of these debts "as if such money had been due and payable before the time of his or her becoming bankrupt." § 39, 2 Stat. 32. The Acts of 1841 and 1867 contained similar provisions.[3] The current Bank-

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[1] Respondent Moore relies upon some language in *United States* v. *State Bank of North Carolina,* 6 Pet. 29, 39 (1832): "Wherever the common law would hold a debt to be debitum in presenti, solvendum in futuro, the statute embraces it just as much as if it were presently payable." But the Court relied upon this common-law phrase to hold that *at least* such debts were within the reach of the priority statute; it certainly did not hold that any debts but these were *excluded* from the statute. And the Court rested its decision upon more than just this phrase. See *supra,* at 82, and *infra,* at 86.

[2] The Act of 1800, § 39, 2 Stat. 19, 32, provided that the "obligee of any bottomry or respondentia bond, and the assured in any policy of insurance, shall be admitted to claim, and after the contingency or loss, to prove the debt thereon."

[3] The Act of 1841, § 5, 5 Stat. 440, 445, provided that contingent or uncertain claims might be proved and paid when they became absolute; debts payable in the future might also be proved, and paid with an appropriate discount. The Act of 1867, c. 176, 14 Stat. 517, allowed in § 19 proof of debts due and payable as of bankruptcy,

ruptcy Act permits proof of unliquidated claims, which will be allowed if they are liquidated or can reasonably be estimated soon enough that the distribution of the estate will not unduly be delayed. 11 U. S. C. §§ 103 (a)(8), (9), 93 (d).[4] The priority statute "is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning," *Price* v. *United States,* 269 U. S., at 500, and to give "debts" a meaning more restrictive than the bankruptcy statutes have given it over 175 years would do just that.

Finally, the parties agree that this Court and other federal courts have regularly applied the priority statute to debts that in fact were unliquidated, although without discussing the precise issue before us in this case. See, *e. g., King* v. *United States,* 379 U. S. 329 (1964); *United States* v. *National Surety Co.,* 254 U. S. 73 (1920); *United States* v. *Brunner,* 282 F. 2d 535 (CA10 1960); *United States* v. *Barnes,* 31 F. 705 (CCSDNY 1887). Respondent Moore relies on dicta in *Massachusetts* v. *United States,* 333 U. S. 611, 627 (1948), to the effect that "obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency" are not "debts due." But the obligation here, and in the cases cited, was fixed and independent of "events after insolvency"; only the precise amount of that obligation awaited future events.[5]

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debts payable in the future, and unliquidated contract damages claims: "[T]he court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed . . . ."

[4] Title 11 U. S. C. § 1 (14) defines a debt as "any debt, demand, or claim provable in bankruptcy."

[5] In *Massachusetts,* the Court held that insolvency cut off a debtor's right to elect to pay the State rather than the Federal

Given the consistent application of the priority statute to fixed but unliquidated obligations, Mr. Justice Story's remarks in *State Bank*, 6 Pet., at 39–40, are particularly appropriate:

> "It is not unimportant to state, that the construction which we have given to the terms of the act, is that which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general, would, of itself, furnish strong grounds for a liberal construction; and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act: but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

For these reasons, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Government an unemployment compensation tax. Permitting post-insolvency election would mean that the priority statute applied to contingent obligations, the Court reasoned, and that result would be anomalous. The "contingency" in *Massachusetts*, of course, was the debtor's election to pay someone other than the United States, and so defeat the obligation entirely. The present case is, as we note, quite different: liability *vel non* will be determined on the facts as they exist at the time of the assignment for the benefit of creditors; subsequent events cannot defeat the obligation.

UNITED STATES *v.* POWELL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–884. Argued October 6, 1975—Decided December 2, 1975

Respondent was convicted of violating 18 U. S. C. § 1715, which proscribes mailing pistols, revolvers, and "other firearms capable of being concealed on the person," by having sent a 22-inch sawed-off shotgun through the mails. There was evidence at the trial that the gun could be concealed on an average person. The Court of Appeals reversed, holding that the quoted portion of § 1715 was so vague as to violate due process. In addition to the constitutional claim respondent contends that as a matter of statutory construction, particularly in light of the *ejusdem generis* doctrine, the quoted portion does not embrace sawed-off shotguns. *Held:*

1. The narrow reading of the statute urged by respondent does not comport with the legislative purpose of making it more difficult for criminals to obtain concealable weapons, and the rule of *ejusdem generis* may not be used to defeat that purpose. Here a properly instructed jury could have found the shotgun mailed by respondent to have been a "firearm capable of being concealed on the person" within the meaning of § 1715. Pp. 90–91.

2. Section 1715 intelligibly forbids a definite course of conduct (mailing concealable firearms) and gave respondent adequate warning that mailing the gun was a criminal offense. That Congress might have chosen "[c]learer and more precise language" equally capable of achieving its objective does not mean that the statute is unconstitutionally vague. *United States* v. *Petrillo*, 332 U. S. 1, 7. Pp. 92–94.

501 F. 2d 1136, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed an opinion concurring in part and dissenting in part, *post*, p. 94.

Frank H. Easterbrook argued the cause for the United States *pro hac vice*. With him on the brief were *Solici-*

tor General Bork and *Acting Assistant Attorney General Keeney.*

Jerry J. Moberg, by appointment of the Court, 421 U. S. 974, argued the cause *pro hac vice* and filed briefs for respondent.

MR. JUSTICE REHNQUIST delivered the opinion for the Court.

The Court of Appeals in a brief *per curiam* opinion held that portion of an Act of Congress prohibiting the mailing of firearms "capable of being concealed on the person," 18 U. S. C. § 1715, to be unconstitutionally vague, and we granted certiorari to review this determination. 420 U. S. 971 (1975). Respondent was found guilty of having violated the statute by a jury in the United States District Court for the Eastern District of Washington, and was sentenced by that court to a term of two years' imprisonment. The testimony adduced at trial showed that a Mrs. Theresa Bailey received by mail an unsolicited package from Spokane, Wash., addressed to her at her home in Tacoma, Wash. The package contained two shotguns, shotgun shells, and 20 or 30 hacksaw blades.

While the source of this package was unknown to Mrs. Bailey, its receipt by her not unnaturally turned her thoughts to her husband George, an inmate at nearby McNeil Island Federal Penitentiary. Her husband, however, disclaimed any knowledge of the package or its contents.[1] Mrs. Bailey turned the package over to federal officials, and subsequent investigation disclosed that both of the shotguns had been purchased on the same date. One had been purchased by respondent, and another by an unidentified woman.

[1] Respondent's husband, Travis Powell, also was an inmate at McNeil Island.

Ten days after having received the first package, Mrs. Bailey received a telephone call from an unknown woman who advised her that a second package was coming but that "it was a mistake." The caller advised her to give the package to "Sally." When Mrs. Bailey replied that she "did not have the address or any way of giving it to Sally," the caller said she would call back.[2]

Several days later, the second package arrived, and Mrs. Bailey gave it unopened to the investigating agents. The return address was that of respondent, and it was later determined that the package bore respondent's handwriting. This package contained a sawed-off shotgun with a barrel length of 10 inches and an overall length of 22⅛ inches, together with two boxes of shotgun shells.

Respondent was indicted on a single count of mailing a firearm capable of being concealed on the person (the sawed-off shotgun contained in the second package), in violation of 18 U. S. C. § 1715.[3] At trial there was evidence that the weapon could be concealed on an average person. Respondent was convicted by a jury which was instructed that in order to return a guilty verdict it must find that she "knowingly caused to be delivered by mail a firearm capable of being concealed on the person."

She appealed her judgment of conviction to the Court of Appeals, and that court held that the portion of

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[2] Mrs. Bailey testified at trial that she did not know "Sally."

[3] Title 18 U. S. C. § 1715 provides in pertinent part:

"Pistols, revolvers, and other firearms capable of being concealed on the person are nonmailable . . . .

"Whoever knowingly deposits for mailing or delivery, or knowingly causes to be delivered by mail according to the direction thereon . . . any pistol, revolver, or firearm declared nonmailable by this section, shall be fined not more than $1,000 or imprisoned not more than two years, or both."

§ 1715 proscribing the mailing of "other firearms capable of being concealed on the person" was so vague that it violated the Due Process Clause of the Fifth Amendment to the United States Constitution. 501 F. 2d 1136 (1974). Citing *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), the court held that, although it was clear that a pistol could be concealed on the person, "the statutory prohibition as it might relate to sawed-off shotguns is not so readily recognizable to persons of common experience and intelligence." 501 F. 2d, at 1137.

While the Court of Appeals considered only the constitutional claim, respondent in this Court makes a statutory argument which may fairly be described as an alternative basis for affirming the judgment of that court. She contends that as a matter of statutory construction, particularly in light of the doctrine of *ejusdem generis*, the language "other firearms capable of being concealed on the person" simply does not extend to sawed-off shotguns. We must decide this threshold question of statutory interpretation first, since if we find the statute inapplicable to respondent, it will be unnecessary to reach the constitutional question, *Dandridge* v. *Williams*, 397 U. S. 471, 475–476 (1970).

The thrust of respondent's argument is that the more general language of the statute ("firearms") should be limited by the more specific language ("pistols and revolvers") so that the phrase "other firearms capable of being concealed on the person" would be limited to "concealable weapons such as pistols and revolvers."

We reject this contention. The statute by its terms bans the mailing of "firearms capable of being concealed on the person," and we would be justified in narrowing the statute only if such a narrow reading was supported by evidence of congressional intent over and above the language of the statute.

In *Gooch* v. *United States,* 297 U. S. 124, 128 (1936), the Court said:

> "The rule of *ejusdem generis,* while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view."

The legislative history of this particular provision is sparse, but the House report indicates that the purpose of the bill upon which § 1715 is based was to avoid having the Post Office serve as an instrumentality for the violation of local laws which prohibited the purchase and possession of weapons. H. R. Rep. No. 610, 69th Cong., 1st Sess. (1926). It would seem that sawed-off shotguns would be even more likely to be prohibited by local laws than would pistols and revolvers. A statement by the author of the bill, Representative Miller of Washington, on the floor of the House indicates that the purpose of the bill was to make it more difficult for criminals to obtain concealable weapons. 66 Cong. Rec. 726 (1924). To narrow the meaning of the language Congress used so as to limit it to only those weapons which could be concealed as readily as pistols or revolvers would not comport with that purpose. Cf. *United States* v. *Alpers,* 338 U. S. 680, 682 (1950).

We therefore hold that a properly instructed jury could have found the 22-inch sawed-off shotgun mailed by respondent to have been a "firearm capable of being concealed on the person" within the meaning of 18 U. S. C. § 1715. Having done so, we turn to the Court of

Appeals' holding that this portion of the statute was unconstitutionally vague.

We said last Term that "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U. S. 544, 550 (1975). The Court of Appeals dealt with the statute generally, rather than as applied to respondent in this case. It must necessarily have concluded, therefore, that the prohibition against mailing "firearms capable of being concealed on the person" proscribed no comprehensible course of conduct at all. It is well settled, of course, that such a statute may not constitutionally be applied to any set of facts. *Lanzetta* v. *New Jersey*, 306 U. S., at 453; *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391 (1926).

An example of such a vague statute is found in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89 (1921). The statute there prohibited any person from "willfully . . . mak[ing] any unjust or unreasonable rate or charge in . . . dealing in or with any necessaries. . . ." So worded it "forbids no specific or definite act" and "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Ibid.*

On the other hand, a statute which provides that certain oversized or heavy loads must be transported by the "shortest practicable route" is not unconstitutionally vague. *Sproles* v. *Binford*, 286 U. S. 374, 393 (1932). The carrier has been given clear notice that a reasonably ascertainable standard of conduct is mandated; it is for him to insure that his actions do not fall outside the legal limits. The sugar dealer in *Cohen*, to the contrary, could have had no idea in advance what an "unreasonable rate" would be because that would have been deter-

mined by the vagaries of supply and demand, factors over which he had no control. Engaged in a lawful business which Congress had in no way sought to proscribe, he could not have charged *any* price with the confidence that it would not be later found unreasonable.

But the challenged language of 18 U. S. C. § 1715 is quite different from that of the statute involved in *Cohen*. It intelligibly forbids a definite course of conduct: the mailing of concealable firearms. While doubts as to the applicability of the language in marginal fact situations may be conceived, we think that the statute gave respondent adequate warning that her mailing of a 22-inch-long sawed-off shotgun was a criminal offense. Even as to more doubtful cases than that of respondent, we have said that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U. S. 373, 377 (1913).

The Court of Appeals questioned whether the "person" referred to in the statute to measure capability of concealment was to be "the person mailing the firearm, the person receiving the firearm, or, perhaps, an average person, male or female, wearing whatever garb might be reasonably appropriate, wherever the place and whatever the season." 501 F. 2d, at 1137. But we think it fair to attribute to Congress the commonsense meaning that such a person would be an average person garbed in a manner to aid, rather than hinder, concealment of the weapons. Such straining to inject doubt as to the meaning of words where no doubt would be felt by the normal reader is not required by the "void for vagueness" doctrine, and we will not indulge in it.

The Court of Appeals also observed that "[t]o require Congress to delimit the size of the firearms (other than pistols and revolvers) that it intends to declare unmail-

able is certainly to impose no insurmountable burden upon it . . . ." *Ibid.* Had Congress chosen to delimit the size of the firearms intended to be declared unmailable, it would have written a different statute and in some respects a narrower one than it actually wrote. To the extent that it was intended to proscribe the mailing of *all* weapons capable of being concealed on the person, a statute so limited would have been less inclusive than the one Congress actually wrote.

But the more important disagreement we have with this observation of the Court of Appeals is that it seriously misconceives the "void for vagueness" doctrine. The fact that Congress might, without difficulty, have chosen "[c]learer and more precise language" equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague. *United States* v. *Petrillo,* 332 U. S. 1, 7 (1947).

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEWART, concurring in part and dissenting in part.

I agree with the Court that the statutory provision before us is not unconstitutionally vague, because I think the provision has an objectively measurable meaning under established principles of statutory construction. Specifically, I think the rule of *ejusdem generis* is applicable here, and that 18 U. S. C. § 1715 must thus be read specifically to make criminal the mailing of a pistol or revolver, or of any firearm *as* "capable of being concealed on the person" as a pistol or revolver.

The rule of *ejusdem generis* is applicable in a setting such as this unless its application would defeat the intention of Congress or render the general statutory language meaningless. See *United States* v. *Alpers,* 338

U. S. 680, 682; *United States* v. *Salen,* 235 U. S. 237, 249–251; *United States* v. *Stever,* 222 U. S. 167, 174–175. Application of the rule in the present situation entails neither of those results. Instead of draining meaning from the general language of the statute, an *ejusdem generis* construction gives to that language an ascertainable and intelligible content. And, instead of defeating the intention of Congress, an *ejusdem generis* construction coincides with the legislative intent.

The legislative history of the bill on which § 1715 was based contains persuasive indications that it was not intended to apply to firearms larger than the largest pistols or revolvers. Representative Miller, the bill's author, made it clear that the legislative concern was not with the "shotgun, the rifle, or any firearm used in hunting or by the sportsman." 66 Cong. Rec. 727. As a supporter of the legislation stated: "The purpose . . . is to prevent the shipment of pistols and revolvers through the mails." 67 Cong. Rec. 12041. The only reference to sawed-off shotguns came in a question posed by Representative McKeown: "Is there anything in this bill that will prevent the citizens of Oklahoma from buying sawed-off shotguns to defend themselves against these bank-robbing bandits?" Representative Blanton, an opponent of the bill, responded: "That may come next. Sometimes a revolver is more necessary than a sawed-off shotgun." 66 Cong. Rec. 729. In the absence of more concrete indicia of legislative intent, the pregnant silence that followed Representative Blanton's response can surely be taken as an indication that Congress intended the law to reach only weapons of the same general size as pistols and revolvers.

I would vacate the judgment of the Court of Appeals and remand the case to that court for further proceedings consistent with these views.

MICHIGAN *v.* MOSLEY

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 74–653. Argued October 6, 1975—Decided December 9, 1975

Respondent, who had been arrested in connection with certain robberies and advised by a detective in accordance with *Miranda* v. *Arizona*, 384 U. S. 436, that he was not obliged to answer any questions and that he could remain silent if he wished, and having made oral and written acknowledgment of the *Miranda* warnings, declined to discuss the robberies, whereupon the detective ceased the interrogation. More than two hours later, after giving *Miranda* warnings, another detective questioned respondent solely about an unrelated murder. Respondent made an inculpatory statement, which was later used in his trial for murder, which resulted in his conviction. The appellate court reversed on the ground that *Miranda* mandated a cessation of all interrogation after respondent had declined to answer the first detective's questions. *Held:* The admission in evidence of respondent's incriminating statement did not violate *Miranda* principles. Respondent's right to cut off questioning was scrupulously honored, the police having immediately ceased the robbery interrogation after respondent's refusal to answer and having commenced questioning about the murder only after a significant time lapse and after a fresh set of warnings had been given respondent. *Westover* v. *United States*, 384 U. S. 436, distinguished. Pp. 99–107.

51 Mich. App. 105, 214 N. W. 2d 564, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in the result, *post*, p. 107. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 111.

Thomas M. Khalil argued the cause for petitioner. With him on the brief were *William L. Cahalan*, *Dominick R. Carnovale*, and *Robert A. Reuther*.

Carl Ziemba argued the cause and filed a brief for respondent.*

**Frank Carrington*, *Fred E. Inbau*, *William K. Lambie*, and

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondent, Richard Bert Mosley, was arrested in Detroit, Mich., in the early afternoon of April 8, 1971, in connection with robberies that had recently occurred at the Blue Goose Bar and the White Tower Restaurant on that city's lower east side. The arresting officer, Detective James Cowie of the Armed Robbery Section of the Detroit Police Department, was acting on a tip implicating Mosley and three other men in the robberies.[1] After effecting the arrest, Detective Cowie brought Mosley to the Robbery, Breaking and Entering Bureau of the Police Department, located on the fourth floor of the departmental headquarters building. The officer advised Mosley of his rights under this Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436, and had him read and sign the department's constitutional rights notification certificate. After filling out the necessary arrest papers, Cowie began questioning Mosley about the robbery of the White Tower Restaurant. When Mosley said he did not want to answer any questions about the robberies, Cowie promptly ceased the interrogation. The completion of the arrest papers and the questioning of Mosley together took approximately 20 minutes. At no time during the questioning did Mosley indicate a desire to consult with a lawyer, and there is no claim that the procedures followed to this point did not fully comply with the strictures of the *Miranda* opinion. Mosley was then taken to a ninth-floor cell block.

Shortly after 6 p. m., Detective Hill of the Detroit

Wayne W. Schmidt filed a brief for Americans for Effective Law Enforcement, Inc., as *amicus curiae* urging reversal.

[1] The officer testified that information supplied by an anonymous caller was the sole basis for his arrest of Mosley.

Police Department Homicide Bureau brought Mosley from the cell block to the fifth-floor office of the Homicide Bureau for questioning about the fatal shooting of a man named Leroy Williams. Williams had been killed on January 9, 1971, during a holdup attempt outside the 101 Ranch Bar in Detroit. Mosley had not been arrested on this charge or interrogated about it by Detective Cowie.[2] Before questioning Mosley about this homicide, Detective Hill carefully advised him of his "*Miranda* rights." Mosley read the notification form both silently and aloud, and Detective Hill then read and explained the warnings to him and had him sign the form. Mosley at first denied any involvement in the Williams murder, but after the officer told him that Anthony Smith had confessed to participating in the slaying and had named him as the "shooter," Mosley made a statement implicating himself in the homicide.[3] The interrogation by Detective Hill lasted approximately 15 minutes, and at no time during its course did Mosley ask to consult with a lawyer or indicate that he did not want to discuss the homicide. In short, there is no claim that the procedures followed during Detective Hill's interrogation of Mosley, standing alone, did not fully comply with the strictures of the *Miranda* opinion.[4]

Mosley was subsequently charged in a one-count information with first-degree murder. Before the trial he moved to suppress his incriminating statement on a number of grounds, among them the claim that under the doctrine of the *Miranda* case it was constitutionally

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[2] The original tip to Detective Cowie had, however, implicated Mosley in the Williams murder.

[3] During cross-examination by Mosley's counsel at the evidentiary hearing, Detective Hill conceded that Smith in fact had not confessed but had "denied a physical participation in the robbery."

[4] But see n. 5, *infra*.

impermissible for Detective Hill to question him about the Williams murder after he had told Detective Cowie that he did not want to answer any questions about the robberies.[5] The trial court denied the motion to suppress after an evidentiary hearing, and the incriminating statement was subsequently introduced in evidence against Mosley at his trial. The jury convicted Mosley of first-degree murder, and the court imposed a mandatory sentence of life imprisonment.

On appeal to the Michigan Court of Appeals, Mosley renewed his previous objections to the use of his incriminating statement in evidence. The appellate court reversed the judgment of conviction, holding that Detective Hill's interrogation of Mosley had been a *per se* violation of the *Miranda* doctrine. Accordingly, without reaching Mosley's other contentions, the Court remanded the case for a new trial with instructions that Mosley's statement be suppressed as evidence. 51 Mich. App. 105, 214 N. W. 2d 564. After further appeal was denied by the Michigan Supreme Court, 392 Mich. 764, the State filed a petition for certiorari here. We granted the writ because of the important constitutional question presented. 419 U. S. 1119.

In the *Miranda* case this Court promulgated a set of safeguards to protect the there-delineated constitutional rights of persons subjected to custodial police interrogation. In sum, the Court held in that case that unless law enforcement officers give certain specified warnings be-

[5] In addition to the claim that Detective Hill's questioning violated *Miranda*, Mosley contended that the statement was the product of an illegal arrest, that the statement was inadmissible because he had not been taken before a judicial officer without unnecessary delay, and that it had been obtained through trickery and promises of leniency. He argued that these circumstances, either independently or in combination, required the suppression of his incriminating statement.

fore questioning a person in custody,[6] and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary. See *Michigan* v. *Tucker*, 417 U. S. 433, 443.

Neither party in the present case challenges the continuing validity of the *Miranda* decision, or of any of the so-called guidelines it established to protect what the Court there said was a person's constitutional privilege against compulsory self-incrimination. The issue in this case, rather, is whether the conduct of the Detroit police that led to Mosley's incriminating statement did in fact violate the *Miranda* "guidelines," so as to render the statement inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a *per se* violation of *Miranda:*

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody

[6] The warnings must inform the person in custody "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U. S., at 444.

> interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U. S., at 473–474.[7]

This passage states that "the interrogation must cease" when the person in custody indicates that "he wishes to remain silent." It does not state under what circumstances, if any, a resumption of questioning is permissible.[8] The passage could be literally read to mean that

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[7] The present case does not involve the procedures to be followed if the person in custody asks to consult with a lawyer, since Mosley made no such request at any time. Those procedures are detailed in the *Miranda* opinion as follows:

"If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

"This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." *Id.*, at 474.

[8] The Court did state in a footnote:

"If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and

a person who has invoked his "right to silence" can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize "any statement taken after the person invokes his privilege" as "the product of compulsion" and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.

It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any

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might fairly be construed as a waiver of the privilege for purposes of these statements." *Id.*, at 474 n. 44.

This footnote in the *Miranda* opinion is not relevant to the present case, since Mosley did not have an attorney present at the time he declined to answer Detective Cowie's questions, and the officer did not continue to question Mosley but instead ceased the interrogation in compliance with *Miranda*'s dictates.

police officer on any subject, once the person in custody has indicated a desire to remain silent.[9]

A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." 384 U. S., at 479. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." *Id.*, at 474. Through the exercise of his option to terminate questioning he can control the time at

[9] It is instructive to note that the vast majority of federal and state courts presented with the issue have concluded that the *Miranda* opinion does not create a *per se* proscription of any further interrogation once the person being questioned has indicated a desire to remain silent. See *Hill* v. *Whealon*, 490 F. 2d 629, 630, 635 (CA6 1974); *United States* v. *Collins*, 462 F. 2d 792, 802 (CA2 1972) (en banc); *Jennings* v. *United States*, 391 F. 2d 512, 515–516 (CA5 1968); *United States* v. *Choice*, 392 F. Supp. 460, 466–467 (ED Pa. 1975); *McIntyre* v. *New York*, 329 F. Supp. 9, 13–14 (EDNY 1971); *People* v. *Naranjo*, 181 Colo. 273, 277–278, 509 P. 2d 1235, 1237 (1973); *People* v. *Pittman*, 55 Ill. 2d 39, 54–56, 302 N. E. 2d 7, 16–17 (1973); *State* v. *McClelland*, 164 N. W. 2d 189, 192–196 (Iowa 1969); *State* v. *Law*, 214 Kan. 643, 647–649, 522 P. 2d 320, 324–325 (1974); *Conway* v. *State*, 7 Md. App. 400, 405–411, 256 A. 2d 178, 181–184 (1969); *State* v. *O'Neill*, 299 Minn. 60, 70–71, 216 N. W. 2d 822, 829 (1974); *State* v. *Godfrey*, 182 Neb. 451, 454–457, 155 N. W. 2d 438, 440–442 (1968); *People* v. *Gary*, 31 N. Y. 2d 68, 69–70, 286 N. E. 2d 263, 264 (1972); *State* v. *Bishop*, 272 N. C. 283, 296–297, 158 S. E. 2d 511, 520 (1968); *Commonwealth* v. *Grandison*, 449 Pa. 231, 233–234, 296 A. 2d 730, 731 (1972); *State* v. *Robinson*, 87 S. D. 375, 378, 209 N. W. 2d 374, 375–377 (1973); *Hill* v. *State*, 429 S. W. 2d 481, 486–487 (Tex. Crim. App. 1968); *State* v. *Estrada*, 63 Wis. 2d 476, 486–488, 217 N. W. 2d 359, 365–366 (1974). See also *People* v. *Fioritto*, 68 Cal. 2d 714, 717–720, 441 P. 2d 625, 626–628 (1968) (permitting the suspect but not the police to initiate further questioning).

Citation of the above cases does not imply a view of the merits of any particular decision.

which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored." [10]

A review of the circumstances leading to Mosley's confession reveals that his "right to cut off questioning" was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the *Miranda* warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete *Miranda* warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer,

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[10] The dissenting opinion asserts that *Miranda* established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. *Post*, at 116–117. But clearly the Court in *Miranda* imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that "the interrogation must cease until an attorney is present" only "[i]f the individual states that he wants an attorney." 384 U. S., at 474.

and was carefully given a full and fair opportunity to exercise these options. The subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. Although it is not clear from the record how much Detective Hill knew about the earlier interrogation, his questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies.[11]

This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to

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[11] Detective Cowie gave the only testimony at the suppression hearing concerning the scope of Mosley's earlier refusal to answer his questions:

"A. I think at that time he declined to answer whether he had been involved.

"Q. He declined to answer?

"A. Yes. Anything about the robberies."

At the suppression hearing, Mosley did not in any way dispute Cowie's testimony. Not until trial, after the judge had denied the motion to suppress the incriminating statement, did Mosley offer a somewhat different version of his earlier refusal to answer Detective Cowie's questions. The briefs submitted by Mosley's counsel to the Michigan Court of Appeals and to this Court accepted Detective Cowie's account of the interrogation as correct, and the Michigan Court of Appeals decided the case on that factual premise. At oral argument before this Court, both counsel discussed the case solely in terms of Cowie's description of the events.

wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

The Michigan Court of Appeals viewed this case as factually similar to *Westover* v. *United States*, 384 U. S. 436, a companion case to *Miranda*. But the controlling facts of the two cases are strikingly different.

In *Westover*, the petitioner was arrested by the Kansas City police at 9:45 p. m. and taken to the police station. Without giving any advisory warnings of any kind to Westover, the police questioned him that night and throughout the next morning about various local robberies. At noon, three FBI agents took over, gave advisory warnings to Westover, and proceeded to question him about two California bank robberies. After two hours of questioning, the petitioner confessed to the California crimes. The Court held that the confession obtained by the FBI was inadmissible because the interrogation leading to the petitioner's statement followed on the heels of prolonged questioning that was commenced and continued by the Kansas City police without preliminary warnings to Westover of any kind. The Court found that "the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation" and that the belated warnings given by the federal officers were "not sufficient to protect" Westover because from his point of view "the warnings came at the end of the interrogation process." *Id.*, at 497, 496.

Here, by contrast, the police gave full "*Miranda* warnings" to Mosley at the very outset of each interrogation, subjected him to only a brief period of initial question-

ing, and suspended questioning entirely for a significant period before beginning the interrogation that led to his incriminating statement. The cardinal fact of *Westover*—the failure of the police officers to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him—was simply not present in this case. The Michigan Court of Appeals was mistaken, therefore, in believing that Detective Hill's questioning of Mosley was "not permitted" by the *Westover* decision. 51 Mich. App., at 108, 214 N. W. 2d, at 566.

For these reasons, we conclude that the admission in evidence of Mosley's incriminating statement did not violate the principles of *Miranda* v. *Arizona*. Accordingly, the judgment of the Michigan Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring in the result.

I concur in the result and in much of the majority's reasoning. However, it appears to me that, in an effort to make only a limited holding in this case, the majority has implied that some custodial confessions will be suppressed even though they follow an informed and voluntary waiver of the defendant's rights. The majority seems to say that a statement obtained within some unspecified time after an assertion by an individual of his "right to silence" is always inadmissible, even if it was the result of an informed and voluntary decision—following, for example, a disclosure to such an individual of a piece of information bearing on his waiver decision which the police had failed to give him prior to his assertion of the privilege but which they gave him immediately thereafter. Indeed, *ante,* at 102, the majority char-

acterizes as "absurd" any contrary rule. I disagree. I do not think the majority's conclusion is compelled by *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and I suspect that in the final analysis the majority will adopt voluntariness as the standard by which to judge the waiver of the right to silence by a properly informed defendant. I think the Court should say so now.

Miranda holds that custody creates an inherent compulsion on an individual to incriminate himself in response to questions, and that statements obtained under such circumstances are therefore obtained in violation of the Fifth Amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently waived." *Id.*, at 471, 475. It also holds that an individual will not be deemed to have made a knowing and intelligent waiver of his "right to silence" unless the authorities have first informed him, *inter alia*, of that right—"the threshold requirement for an intelligent decision as to its exercise." *Id.*, at 468. I am no more convinced that *Miranda* was required by the United States Constitution than I was when it was decided. However, there is at least some support in the law both before and after *Miranda* for the proposition that some rights will never be deemed waived unless the defendant is first expressly advised of their existence. *E. g.*, *Carnley* v. *Cochran*, 369 U. S. 506 (1962); *Boykin* v. *Alabama*, 395 U. S. 238 (1969); Fed. Rules Crim. Proc. 11, 32 (a)(2). There is little support in the law or in common sense for the proposition that an *informed* waiver of a right may be ineffective even where voluntarily made. Indeed, the law is exactly to the contrary, *e. g.*, *Tollett* v. *Henderson*, 411 U. S. 258 (1973); *Brady* v. *United States*, 397 U. S. 742 (1970); *McMann* v. *Richardson*, 397 U. S. 759 (1970); *Parker* v. *North Carolina*, 397 U. S. 790 (1970). Unless an individual is

incompetent, we have in the past rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case. *Faretta* v. *California*, 422 U. S. 806 (1975). To do so would be to "imprison a man in his privileges," [1] *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942), and to disregard " 'that respect for the individual which is the lifeblood of the law,' " *Faretta* v. *California*, *supra*, at 834. I am very reluctant to conclude that *Miranda* stands for such a proposition.

The language of *Miranda* no more compels such a result than does its basic rationale. As the majority points out, the statement in *Miranda*, 384 U. S., at 474, requiring interrogation to *cease* after an assertion of the "right to silence" tells us nothing because it does not indicate how soon this interrogation may resume. The Court showed in the very next paragraph, moreover, that when it wanted to create a *per se* rule against further interrogation after assertion of a right, it knew how to do so. The Court there said "[i]f the individual states that he

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[1] The majority's rule may cause an accused injury. Although a recently arrested individual may have indicated an initial desire not to answer questions, he would nonetheless want to know immediately—if it were true—that his ability to explain a particular incriminating fact or to supply an alibi for a particular time period would result in his immediate release. Similarly, he might wish to know—if it were true—that (1) the case against him was unusually strong and that (2) his immediate cooperation with the authorities in the apprehension and conviction of others or in the recovery of property would redound to his benefit in the form of a reduced charge. Certainly the individual's lawyer, if he had one, would be interested in such information, even if communication of such information followed closely on an assertion of the "right to silence." Where the individual has not requested counsel and has chosen instead to make his own decisions regarding his conversations with the authorities, he should not be deprived even temporarily of any information relevant to the decision.

wants an attorney, the interrogation must cease *until an attorney is present.*" *Ibid.*[2] However, when the individual indicates that *he* will decide unaided by counsel whether or not to assert his "right to silence" the situation is different. In such a situation, the Court in *Miranda* simply said: "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 475. Apparently, although placing a heavy burden on the government, *Miranda* intended waiver of the "right to silence" to be tested by the normal standards. In any event, insofar as the *Miranda* decision might be read to require interrogation to cease for some magical and unspecified period of time following an assertion of the "right to silence," and to reject voluntariness as the standard by which to judge informed waivers of that right, it should be disapproved as inconsistent with otherwise uniformly applied legal principles.

In justifying the implication that questioning must inevitably cease for some unspecified period of time following an exercise of the "right to silence," the ma-

[2] The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.

jority says only that such a requirement would be necessary to avoid "undermining" "the will of the person being questioned." Yet surely a waiver of the "right to silence" obtained by "undermining the will" of the person being questioned would be considered an involuntary waiver. Thus, in order to achieve the majority's only stated purpose, it is sufficient to exclude all confessions which are the result of involuntary waivers. To exclude any others is to deprive the factfinding process of highly probative information for no reason at all. The "repeated rounds" of questioning following an assertion of the privilege, which the majority is worried about, would, of course, count heavily against the State in any determination of voluntariness—particularly if no reason (such as new facts communicated to the accused or a new incident being inquired about) appeared for repeated questioning. There is no reason, however, to rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previous contrary decision. The Court should now so state.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

The Court focuses on the correct passage from *Miranda* v. *Arizona*, 384 U. S. 436, 473–474 (1966) (footnote omitted):

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to

> cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

But the process of eroding *Miranda* rights, begun with *Harris* v. *New York*, 401 U. S. 222 (1971), continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of *Miranda*'s constitutional principles can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination.

The *Miranda* guidelines were necessitated by the inherently coercive nature of in-custody questioning. As in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), "we sought a protective device to dispel the compelling atmosphere of the interrogation." 384 U. S., at 465. We "concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.*, at 467.[1] To assure safeguards that promised to dispel the "inherently compelling pressures" of in-custody interrogation, a prophylactic rule was fashioned to supplement the traditional determination of voluntariness on the facts of each case. *Miranda* held that any confession obtained when not preceded by the required warn-

[1] The Court said further:

"Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U. S., at 458.

ings or an adequate substitute safeguard was *per se* inadmissible in evidence. *Id.*, at 468–469, 479. Satisfaction of this prophylactic rule, therefore, was necessary, though not sufficient, for the admission of a confession. Certiorari was expressly granted in *Miranda* "to give concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.*, at 441–442, that is, clear, objective standards that might be applied to avoid the vagaries of the traditional voluntariness test.

The task that confronts the Court in this case is to satisfy the *Miranda* approach by establishing "concrete constitutional guidelines" governing the resumption of questioning a suspect who, while in custody, has once clearly and unequivocally "indicate[d] . . . that he wishes to remain silent . . . ." As the Court today continues to recognize, under *Miranda*, the cost of assuring voluntariness by procedural tests, independent of any actual inquiry into voluntariness, is that some voluntary statements will be excluded. *Ante*, at 99–100. Thus the consideration in the task confronting the Court is not whether voluntary statements will be excluded, but whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention. The procedures approved by the Court today fail to provide that assurance.

We observed in *Miranda:* "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion

of a voluntary relinquishment of the privilege." 384 U. S., at 476. And, as that portion of *Miranda* which the majority finds controlling observed, "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Id.*, at 474. Thus, as to statements which are the product of renewed questioning, *Miranda* established a virtually irrebuttable presumption of compulsion, see *id.*, at 474 n. 44, and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime. Only by adequate procedural safeguards could the presumption be rebutted.

In formulating its procedural safeguard, the Court skirts the problem of compulsion and thereby fails to join issue with the dictates of *Miranda*. The language which the Court finds controlling in this case teaches that renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect. That teaching is embodied in the form of a proscription on any further questioning once the suspect has exercised his right to remain silent. Today's decision uncritically abandons that teaching. The Court assumes, contrary to the controlling language, that "scrupulously honoring" an initial exercise of the right to remain silent preserves the efficaciousness of initial and future warnings despite the fact that the suspect has once been subjected to interrogation and then has been detained for a lengthy period of time.

Observing that the suspect can control the circumstances of interrogation "[t]hrough the exercise of his option to terminate questioning," the Court concludes "that the admissibility of statements obtained after the person in custody has decided to remain silent depends . . .

on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Ante,* at 103, 104. But scrupulously honoring exercises of the right to cut off questioning is only meaningful insofar as the suspect's will to exercise that right remains wholly unfettered. The Court's formulation thus assumes the very matter at issue here: whether renewed questioning following a lengthy period of detention acts to overbear the suspect's will, irrespective of giving the *Miranda* warnings a second time (and scrupulously honoring them), thereby rendering inconsequential any failure to exercise the right to remain silent. For the Court it is enough conclusorily to assert that "[t]he subsequent questioning did not undercut Mosley's previous decision not to answer Detective Cowie's inquiries." *Ante,* at 105. Under *Miranda,* however, Mosley's failure to exercise the right upon renewed questioning is presumptively the consequence of an overbearing in which detention and that subsequent questioning played central roles.

I agree that *Miranda* is not to be read, on the one hand, to impose an absolute ban on resumption of questioning "at any time or place on any subject," *ante,* at 102, or on the other hand, "to permit a resumption of interrogation after a momentary respite," *ibid.* But this surely cannot justify adoption of a vague and ineffective procedural standard that falls somewhere between those absurd extremes, for *Miranda* in flat and unambiguous terms requires that questioning "cease" when a suspect exercises the right to remain silent. *Miranda*'s terms, however, are not so uncompromising as to preclude the fashioning of guidelines to govern this case. Those guidelines must, of course, necessarily be sensitive to the reality that "[a]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investiga-

tions, where there are often impartial observers to guard against intimidation or trickery." 384 U. S., at 461 (footnote omitted).

The fashioning of guidelines for this case is an easy task. Adequate procedures are readily available. Michigan law requires that the suspect be arraigned before a judicial officer "without unnecessary delay," [2] certainly not a burdensome requirement. Alternatively, a requirement that resumption of questioning should await appointment and arrival of counsel for the suspect would be an acceptable and readily satisfied precondition to resumption.[3] *Miranda* expressly held that "[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]." *Id.*, at 466. The Court expediently bypasses this alternative in its search for circumstances where renewed questioning would be permissible.[4]

Indeed, language in *Miranda* suggests that the

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[2] Mich. Comp. Laws §§ 764.13, 764.26 (1970); Mich. Stat. Ann. §§ 28.871 (1), 28.885 (1972). Detective Cowie's testimony indicated that a judge was available across the street from the police station in which Mosley was held from 2:15 p. m. until 4 p. m. or 4:30 p. m. App. 13. The actual interrogation of Mosley, however, covered only 15 or 20 minutes of this time. *Id.*, at 14. The failure to comply with a simple state-law requirement in these circumstances is totally at odds with the holding that the police "scrupulously honored" Mosley's rights.

[3] In addition, a break in custody for a substantial period of time would permit—indeed it would require—law enforcement officers to give *Miranda* warnings a second time.

[4] I do not mean to imply that counsel may be forced on a suspect who does not request an attorney. I suggest only that either arraignment or counsel must be provided before resumption of questioning to eliminate the coercive atmosphere of in-custody interrogation. The Court itself apparently proscribes resuming questioning until counsel is present if an accused has exercised the right to have an attorney present at questioning. *Ante*, at 101 n. 7.

presence of counsel is the only appropriate alternative. In categorical language we held in *Miranda:* "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.,* at 473–474. We then immediately observed:

> "If an individual indicates his desire to remain silent but has an attorney present, there *may* be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel *might* be free of the compelling influence of the interrogation process and *might* fairly be construed as a waiver of the privilege for purposes of these statements." *Id.,* at 474 n. 44 (emphasis added).

This was the only circumstance in which we at all suggested that questioning could be resumed, and even then, further questioning was not permissible in all such circumstances, for compulsion was still the presumption not easily dissipated.[5]

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[5] The Court asserts that this language is not relevant to the present case, for "Mosley did not have an attorney present at the time he declined to answer Detective Cowie's questions." *Ante,* at 102 n. 8. The language, however, does not compel a reading that it is applicable only if counsel is present when the suspect initially exercises his right to remain silent. Even if it did, this would only indicate that *Miranda* placed even stiffer limits on the circumstances when questioning may be resumed than I suggest here. Moreover, since the concern in *Miranda* was with assuring the absence of compulsion upon renewed questioning, it makes little difference whether counsel is initially present. Thus, even if the language does not specifically address the situation where counsel is not initially present, it certainly contemplates that situation.

The Court also asserts that *Miranda* "directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'" *Ante,* at 104 n. 10

These procedures would be wholly consistent with the Court's rejection of a *"per se* proscription of indefinite duration," *ante,* at 102, a rejection to which I fully subscribe. Today's decision, however, virtually empties *Miranda* of principle, for plainly the decision encourages police asked to cease interrogation to continue the suspect's detention until the police station's coercive atmosphere does its work and the suspect responds to resumed questioning.[6] Today's rejection of that reality of life contrasts sharply with the Court's acceptance only two years ago that "[i]n *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation." *Schneckloth* v. *Bustamonte,* 412 U. S. 218, 247 (1973). I can only conclude that today's decision signals rejection of *Miranda*'s basic premise.

My concern with the Court's opinion does not end with its treatment of *Miranda,* but extends to its treatment of the facts in this case. The Court's effort to have the Williams homicide appear as "an unrelated holdup murder," *ante,* at 104, is patently unsuccessful. The anonymous tip received by Detective Cowie, conceded by the Court to be the sole basis for Mosley's arrest, *ante,* at 97 n. 1, embraced both the robberies covered in Cowie's in-

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(quoting 384 U. S., at 474). This is patently inaccurate. The language from the quoted portion of *Miranda* actually reads: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."

[6] I do not suggest that the Court's opinion is to be read as permitting unreasonably lengthy detention without arraignment so long as any exercise of rights by a suspect is "scrupulously honored." The question of whether there is some constitutional limitation on the length of time police may detain a suspect without arraignment, cf. *Gerstein* v. *Pugh,* 420 U. S. 103 (1975); *Mallory* v. *United States,* 354 U. S. 449 (1957); *McNabb* v. *United States,* 318 U. S. 332 (1943), is an open one and is not now before the Court.

terrogation and the robbery-murder of Williams, *ante*, at 98 n. 2, about which Detective Hill questioned Mosley. Thus, when Mosley was apprehended, Cowie suspected him of being involved in the Williams robbery-murder in addition to the robberies about which he tried to examine Mosley. On another matter, the Court treats the second interrogation as being "at another location," *ante*, at 104. Yet the fact is that it was merely a different floor of the same building, *ante*, at 97–98.[7]

I also find troubling the Court's finding that Mosley never indicated that he did not want to discuss the robbery-murder, see *ante*, at 104–106. I cannot read Cowie's testimony as the Court does. Cowie testified that Mosley

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[7] See *Westover* v. *United States*, 384 U. S. 436, 494 (1966), where Westover confessed after being turned over to the FBI following questioning by local police. We said:

"Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. . . .

"We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from Westover the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege." *Id.*, at 496–497.

It is no answer to say that the questioning was resumed by a second police officer. Surely *Santobello* v. *New York*, 404 U. S. 257, 262 (1971), requires that the case be decided as if it involved two interrogation sessions by a single law enforcement officer.

declined to answer "'[a]nything about the robberies,'" *ante*, at 105 n. 11. That can be read only against the background of the anonymous tip that implicated Mosley in the Williams incident. Read in that light, it may reasonably be inferred that Cowie understood "[a]nything" to include the Williams episode, since the anonymous tip embraced that episode. More than this, the Court's reading of Cowie's testimony is not even faithful to the standard it articulates here today. "Anything about the robberies" may more than reasonably be interpreted as comprehending the Williams murder which occurred during a robbery. To interpret Mosley's alleged statement to the contrary, therefore, hardly honors "scrupulously" the suspect's rights.

In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no State is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution. See *Oregon* v. *Hass*, 420 U. S. 714, 719 (1975);[8] *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972); *Cooper* v. *California*, 386 U. S. 58, 62 (1967). A decision particularly bearing upon the question of the adoption of *Miranda* as state law is *Commonwealth* v. *Ware*, 446 Pa. 52, 284 A. 2d 700 (1971). There the Pennsylvania Supreme Court adopted an aspect of *Miranda* as state law. This Court on March 20,

[8] Although my Brother MARSHALL correctly argued in *Hass*, 420 U. S., at 728 (dissenting), that we should have remanded for the state court to clarify whether it was relying on state or federal law, such a disposition is not required here. In *Hass* the state court cited both federal and state authority; in this case Mosley's counsel has conceded that the self-incrimination argument in the state court was based solely on the Fifth Amendment to the Federal Constitution. Tr. of Oral Arg. 44.

1972, granted the Commonwealth's petition for certiorari to review that decision. 405 U. S. 987. A month later, however, the error of the grant having been made apparent, the Court vacated the order of March 20, "it appearing that the judgment below rests upon an adequate state ground." 406 U. S. 910. Understandably, state courts and legislatures are, as matters of state law, increasingly according protections once provided as federal rights but now increasingly depreciated by decisions of this Court. See, *e. g.*, *State* v. *Santiago*, 53 Haw. 254, 492 P. 2d 657 (1971) (rejecting *Harris* v. *New York*, 401 U. S. 222 (1971)); *People* v. *Beavers*, 393 Mich. 554, 227 N. W. 2d 511 (1975), cert. denied, *post*, p. 878 (rejecting *United States* v. *White*, 401 U. S. 745 (1971)); *State* v. *Johnson*, 68 N. J. 349, 346 A. 2d 66 (1975) (rejecting *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973)); *Commonwealth* v. *Campana*, 455 Pa. 622, 314 A. 2d 854, cert. denied, 417 U. S. 969 (1974) (adopting "same transaction or occurrence" view of Double Jeopardy Clause). I note that Michigan's Constitution has its own counterpart to the privilege against self-incrimination. Mich. Const., Art. 1, § 17; see *State* v. *Johnson*, *supra*.

UNITED STATES *v.* MOORE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-759. Argued October 7, 1975—Decided December 9, 1975

Respondent, a licensed physician registered under the Controlled Substances Act (CSA), 21 U. S. C. § 801 *et seq.*, was convicted of knowing and unlawful distribution and dispensation of methadone (a controlled substance or addictive drug used in the treatment of heroin addicts) in violation of 21 U. S. C. § 841 (a)(1), which makes it unlawful for "any person" knowingly or intentionally to distribute or dispense a controlled substance, except as authorized by the CSA. The evidence disclosed that respondent prescribed large quantities of methadone for patients without giving them adequate physical examinations or specific instructions for its use and charged fees according to the quantity of methadone prescribed rather than fees for medical services rendered. The Court of Appeals, however, reversed the conviction on the grounds that respondent was exempted from prosecution under § 841 by virtue of his status as a registrant and that a registrant can be prosecuted only under §§ 842 and 843, which prescribe less severe penalties than § 841. *Held:* Registered physicians can be prosecuted under § 841 when, as here, their activities fall outside the usual course of professional practice. Pp. 131–145.

(a) Only the lawful acts of registrants under the CSA are exempted from prosecution under § 841. That section by its terms reaches "any person" and does not exempt (as it could have) "all registrants" or "all persons registered under the Act." The language of the qualified authorization of § 822 (b), which authorizes registrants to possess, distribute, or dispense controlled substances to the extent authorized by their registration and in conformity with other CSA provisions, and which was added merely to ensure that persons engaged in lawful activities could not be prosecuted, cannot be fairly read to support the view that all activities of registered physicians are beyond the reach of § 841 simply because of their status. Pp. 131–133.

(b) There is no indication in the operative language of §§ 841–843 that Congress intended to establish two mutually exclusive

penalty systems, with nonregistrants to be punished under § 841 and registrants under §§ 842 and 843, the fact that the term "registrants" is used in some subsections of §§ 842 and 843 but not in § 841 being of limited significance. Moreover, the legislative history indicates that Congress was concerned with the nature of the drug transaction, rather than with the defendant's status. Pp. 133–135.

(c) It is immaterial whether respondent also could have been prosecuted for the relatively minor offense of violating § 829 with respect to the issuing of prescriptions, since there is nothing in the statutory scheme or the legislative history that justifies a conclusion that a registrant who may be prosecuted for violating § 829 is thereby exempted from prosecution under § 841 for the significantly greater offense of acting as a drug "pusher." Pp. 135–138.

(d) The scheme of the CSA, viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority to the course of his "professional practice." Pp. 138–143.

(e) Congress was concerned that the drug laws not impede legitimate research and that physicians be allowed reasonable discretion in treating patients, but it did not intend to exempt from serious criminal penalties those acts by physicians that go beyond the limits of approved professional practice. Pp. 143–145.

(f) Where the statutory purpose is clear, the canon of strict construction of criminal statutes favoring the accused will be satisfied if the words of the statute are "given their fair meaning in accord with the manifest intent of the lawmakers." *United States* v. *Brown*, 333 U. S. 18, 25–26. P. 145.

164 U. S. App. D. C. 319, 505 F. 2d 426, reversed and remanded.

POWELL, J., delivered the opinion for a unanimous Court.

Paul L. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Assistant Attorney General Thornburgh, Acting Assistant Attorney General Keeney,* and *Sidney M. Glazer.*

Raymond W. Bergan argued the cause for respond-

ent. With him on the brief were *Edward Bennett Williams* and *Harold Ungar.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The issue in this case is whether persons who are registered under the Controlled Substances Act (CSA or Act), 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*, can be prosecuted under § 841 for dispensing or distributing controlled substances. The United States Court of Appeals for the District of Columbia Circuit reversed the conviction of respondent, a licensed physician registered under the Act, on the ground that he was exempted from prosecution under § 841 by virtue of his status as a registrant. We reverse and hold that registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice.

I

Dr. Moore was charged, in a 639-count indictment, with the knowing and unlawful distribution and dispensation of methadone (Dolophine), a Schedule II controlled substance,[1] in violation of 21 U. S. C. § 841 (a)(1). That subsection provides:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or

[1] A substance listed in Schedule II has "a high potential for abuse," "a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions," and is a drug the abuse of which "may lead to severe psychological or physical dependence." 21 U. S. C. § 812 (b)(2). Methadone is listed as a Schedule II drug in § 812 (c), Schedule II (b)(11).

> possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

The indictment covered a 5½-month period from late August 1971 to early February 1972. It was reduced before trial to 40 counts, and the jury convicted respondent on 22 counts. He was sentenced to concurrent terms of five to 15 years' imprisonment on 14 counts, and to concurrent terms of 10 to 30 years on the remaining eight counts. The second set of sentences was to be consecutive with the first. Fines totaling $150,000 were also imposed.[2]

Methadone is an addictive drug used in the treatment of heroin addicts. If taken without controls it can, like heroin, create euphoric "highs," but if properly administered it eliminates the addict's craving for heroin without providing a "high." The two principal methods of treating heroin addicts with methadone are "detoxification" and "maintenance." Under a maintenance program, the addict is given a fixed dose once a day for an indefinite period to keep him from using heroin. In detoxification the addict is given a large dose of methadone during the first few days of treatment to keep him free of withdrawal symptoms. Then the dose is gradually reduced until total abstinence is reached.

Maintenance is the more controversial method of treatment. During the period covered by the indictment, registration under § 822, in itself, did not entitle a physician to conduct a maintenance program. In addition to a § 822 registration, the physician who wished to conduct such a program was required to

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[2] In addition, Dr. Moore's license to practice medicine was revoked pursuant to D. C. Code Ann. § 2–131 (1973), which authorizes revocation upon the conviction of "any felony." An appeal from the conviction acts "as a supersedeas to the judgment . . . revoking his license . . . ."

obtain authorization from the Food and Drug Administration for investigation of a new drug. Dr. Moore's authorization by the FDA was revoked in the summer of 1971, and he does not claim that he was conducting an authorized maintenance program. Instead, his defense at trial was that he had devised a new method of detoxification based on the work of a British practitioner. He testified that he prescribed large quantities of methadone to achieve a "blockade" condition, in which the addict was so saturated with methadone that heroin would have no effect, and to instill a strong psychological desire for detoxification. The Government's position is that the evidence established that Dr. Moore's conduct was inconsistent with all accepted methods of treating addicts, that in fact he operated as a "pusher."

Respondent concedes in his brief that he did not observe generally accepted medical practices. He conducted a large-scale operation. Between September 1971 and mid-February 1972 three District of Columbia pharmacies filled 11,169 prescriptions written by Dr. Moore. These covered some 800,000 methadone tablets. On 54 days during that period respondent wrote over 100 prescriptions a day. In billing his patients he used a "sliding-fee scale" pegged solely to the quantity prescribed, rather than to the medical services performed. The fees ranged from $15 for a 50-pill prescription to $50 for 150 pills. In five and one-half months Dr. Moore's receipts totaled at least $260,000.

When a patient entered the office he was given only the most perfunctory examination. Typically this included a request to see the patient's needle marks (which in more than one instance were simulated) and an unsupervised urinalysis (the results of which were regularly ignored). A prescription was then written for the amount requested by the patient. On return visits—for

which appointments were never scheduled—no physical examination was performed and the patient again received a prescription for whatever quantity he requested. Accurate records were not kept, and in some cases the quantity prescribed was not recorded. There was no supervision of the administration of the drug. Dr. Moore's instructions consisted entirely of a label on the drugs reading: "Take as directed for detoxification." Some patients used the tablets to get "high"; others sold them or gave them to friends or relatives. Several patients testified that their use of methadone increased dramatically while they were under respondent's care.[3]

The Court of Appeals, with one judge dissenting, assumed that respondent acted wrongfully but held that he could not be prosecuted under § 841.[4] 164 U. S.

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[3] One patient testified that he was taking approximately two to three pills per day when he started visiting Dr. Moore. By the end of his visits he was taking 30 to 35 pills a day. App. 43. Another patient increased his intake from five to 10 pills a day to almost 70. *Id.*, at 53–54. A third addict, relying on Dr. Moore for drugs, increased his intake from seven pills a day to over 100. Tr. 310.

[4] Section 841 (a) provides, in full:

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

"(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance."

"Dispense" is defined in § 802 (10) to mean "to deliver a controlled substance to an ultimate user . . . by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance . . . ." Section 802 (11) defines "distribute" to mean "to deliver (other than by administering or dispensing) a controlled substance." "Administer" refers to "the direct application of a controlled substance to the body of a patient . . . ." § 802 (2).

App. D. C. 319, 505 F. 2d 426 (1974). The court found that Congress intended to subject registered physicians to prosecution only under §§ 842 and 843,[5] which pre-

[5] Section 842 in relevant part provides:

"(a) Unlawful acts.

"It shall be unlawful for any person—

"(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

"(2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration;

"(3) who is a registrant to distribute a controlled substance in violation of section 825 of this title;

"(4) to remove, alter, or obliterate a symbol or label required by section 825 of this title;

"(5) to refuse or fail to make, keep, or furnish any record, report, notification, declaration, order or order form, statement, invoice, or information required under this subchapter or subchapter II of this chapter;

"(6) to refuse any entry into any premises or inspection authorized by this subchapter or subchapter II of this chapter;

"(7) to remove, break, injure, or deface a seal placed upon controlled substances pursuant to section 824 (f) or 881 of this title or to remove or dispose of substances so placed under seal; or

"(8) to use, to his own advantage, or to reveal, other than to duly authorized officers or employees of the United States, or to the courts when relevant in any judicial proceeding under this subchapter or subchapter II of this chapter, any information acquired in the course of an inspection authorized by this subchapter concerning any method or process which as a trade secret is entitled to protection.

"(b) Manufacture.

"It shall be unlawful for any person who is a registrant to manufacture a controlled substance in Schedule I or II which is—

"(1) not expressly authorized by his registration and by a quota assigned to him pursuant to section 826 of this title; or

"(2) in excess of a quota assigned to him pursuant to section 826 of this title."

[*Footnote 5 is continued on p. 129*]

scribe less severe penalties than § 841.[6] The court reasoned:

". . . Congress intended to deal with registrants pri-

Section 843 provides:

"(a) Unlawful acts.

"It shall be unlawful for any person knowingly or intentionally—

"(1) who is a registrant to distribute a controlled substance classified in schedule I or II, in the course of his legitimate business, except pursuant to an order or an order form as required by section 828 of this title;

"(2) to use in the course of the manufacture or distribution of a controlled substance a registration number which is fictitious, revoked, suspended, or issued to another person;

"(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge;

"(4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter or subchapter II of this chapter; or

"(5) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit substance.

"(b) Communication facility.

"It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures, or sounds of all kinds and includes mail, telephone, wire, radio, and all other means of communication."

[6] Violations of § 841, under which respondent was convicted, carry sentences of up to 15 years, fines as high as $25,000,

> marily through a system of administrative controls, relying on modest penalty provisions to enforce those controls, and reserving the severe penalties provided for in § 841 for those seeking to avoid regulation entirely by not registering." 164 U. S. App. D. C., at 323, 505 F. 2d, at 430.

It said, further, that §§ 842 and 843 were enacted to enforce that scheme, while § 841 was reserved for prosecution of those outside the "legitimate distribution chain." Persons registered under the Act were "authorized by [the] subchapter" within the meaning of § 841 and thus were thought to be immunized against prosecution under that section.[7]

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or both. § 841 (b). Knowing violators of § 842 are subject at most to imprisonment for one year, a fine of $25,000, or both. There also may be a civil penalty of $25,000 for violation of § 842. § 842 (c). The penalties for violation of § 843 are imprisonment for not more than four years, a fine of not more than $30,000, or both. § 843 (c). All three sections impose higher penalties for violations after the first conviction.

[7] The decision below stands alone. At the time it was issued it conflicted with the rulings of four other Circuits. Courts of Appeals for the First, Fifth, and Tenth Circuits had held squarely that physicians may be prosecuted under § 841. See *United States* v. *Badia*, 490 F. 2d 296 (CA1 1973); *United States* v. *Collier*, 478 F. 2d 268 (CA5 1973); *United States* v. *Leigh*, 487 F. 2d 206 (CA5 1973); *United States* v. *Bartee*, 479 F. 2d 484 (CA10 1973); *United States* v. *Jobe*, 487 F. 2d 268 (CA10 1973). The Ninth Circuit also had affirmed the conviction of a physician under § 841 (a)(1). *United States* v. *Larson*, 507 F. 2d 385 (1974). Since the ruling in this case, two other decisions have considered the issue and expressly rejected the analysis of the Court of Appeals for the District of Columbia Circuit. See *United States* v. *Rosenberg*, 515 F. 2d 190 (CA9 1975); *United States* v. *Green*, 511 F. 2d 1062 (CA7 1975). The Sixth Circuit has implicitly agreed. It reversed the conviction of a physician and remanded the case for a new trial because the trial court had failed to instruct the jury that physicians are exempt from prosecution under § 841 (a)(1) when they dispense or prescribe controlled substances in good faith to patients in the regular course of

Respondent advances two basic arguments, contending that each requires affirmance of the Court of Appeals: (i) as that court held, registered physicians may be prosecuted only under §§ 842 and 843; and (ii) in any event, respondent cannot be prosecuted under § 841 because his conduct was "authorized by [the] subchapter" in question. We now consider each of these arguments.

II

A

Section 841 (a)(1) makes distribution and dispensing of drugs unlawful "[e]xcept as authorized by this subchapter . . . ." Relying on this language, the Court of Appeals held that a physician registered under the Act is *per se* exempted from prosecution under § 841 because of his status as a registrant. We take a different view and hold that only the lawful acts of registrants are exempted. By its terms § 841 reaches "any person." It does not exempt (as it could have) "all registrants" or "all persons registered under this Act."

The Court of Appeals relied also on § 822 (b), which provides: "Persons registered . . . under this subchapter to . . . distribute, or dispense controlled substances are authorized to possess, . . . distribute, or dispense such substances . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter." This is a qualified authorization of certain activities, not a blanket authorization of all acts by certain persons. This limitation is emphasized by the subsection's heading "Authorized activities," which parallels the headings of §§ 841–843 "Unlawful acts." We think the statutory language cannot fairly be read to support the view that all activities of registered physi-

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professional practice. *United States* v. *Carroll,* 518 F. 2d 187 (1975).

cians are exempted from the reach of § 841 simply because of their status.

If § 822 (b) were construed to authorize all such activities, thereby exempting them from other constraints, it would constitute a sharp departure from prior laws. But there is no indication that Congress had any such intent. Physicians who stepped outside the bounds of professional practice could be prosecuted under the Harrison Act (Narcotics) of 1914, 38 Stat. 785, the predecessor of the CSA. In *Jin Fuey Moy* v. *United States,* 254 U. S. 189 (1920), the Court affirmed the conviction of a physician on facts remarkably similar to those before us (*e. g.,* no adequate physical examination, the dispensing of large quantities of drugs without specific directions for use, and fees graduated according to the amount of drugs prescribed). A similar conviction was upheld in *United States* v. *Behrman,* 258 U. S. 280 (1922), where the defendant-doctor had prescribed heroin, morphine, and cocaine to a person whom he knew to be an addict.

In enacting the CSA Congress attempted to devise a more flexible penalty structure than that used in the Harrison Act. H. R. Rep. No. 91–1444, Pt. 1, pp. 1, 4 (1970).[8] Penalties were geared to the nature of the violation, including the character of the drug involved. But the Act was intended to "strengthen," rather than to weaken, "existing law enforcement authority in the field of drug abuse." 84 Stat. 1236 (1970) (preamble). See also H. R. Rep. No. 91–1444, p. 1.

Section 822 (b) was added to the original bill at a late date [9] to "make it clear that persons registered under

[8] To this end controlled substances were classified in five categories according to their potential for abuse, their promise for treatment, and their psychological and physical effects. § 812.

[9] Section 822 (b) was added by the House Committee on Interstate and Foreign Commerce. No comparable section was in the Act when it passed the Senate on January 28, 1970.

this title are authorized to deal in or handle controlled substances." H. R. Rep. No. 91–1444, p. 38. It is unlikely that Congress would seek, in this oblique way, to carve out a major new exemption, not found in the Harrison Act, for physicians and other registrants. Rather, § 822 (b) was added merely to ensure that persons engaged in lawful activities could not be prosecuted.

B

Respondent nonetheless contends that §§ 841 and 822 (b) must be interpreted in light of a congressional intent to set up two separate and distinct penalty systems: Persons not registered under the Act are to be punished under § 841, while those who are registered are to be subject only to the sanctions of §§ 842 and 843. The latter two sections, the argument goes, establish modest penalties which are the sole sanctions in a system of strict administrative regulation of registrants.

The operative language of those sections provides no real support for the proposition that Congress intended to establish two mutually exclusive systems. It is true that the term "registrants" is used in §§ 842 and 843, and not in § 841. But this is of limited significance. All three sections provide that "[i]t shall be unlawful for any person . . . [to commit the proscribed acts]." Two of the eight subsections of § 842 (a), one of the five subsections of § 843 (a), and § 842 (b) further qualify "any person" with "who is a registrant." The other subsections of §§ 842 and 843 are not so limited. In context, "registrant" is merely a limiting term, indicating that the only "persons" who are subject to these subsections are "registrants." [10] There is no indication that "persons"

[10] This represents a commonsense recognition by Congress that only a registrant could, for example, distribute drugs "not authorized by his registration," § 842 (a)(2), or manufacture substances "not expressly authorized by his registration" or "in excess of [his]

means "nonregistrants" when introducing the other subsections.

There are other indications that § 841, and §§ 842 and 843, do not constitute two discrete systems. Section 843 (b), for example, makes it unlawful for any person to use a communication facility in committing a felony under any provision of the subchapter. But violations of both § 841 and § 843 lead to felony convictions; criminal violations of § 842 are misdemeanors.[11] §§ 842 (c)(2)(A), 802 (13); 18 U. S. C. § 1. And counsel for respondent agreed at oral argument that registrants can be prosecuted under § 841 (a)(2), which prohibits the creation, distribution, dispensing, or possession with intent to distribute or dispense of a "counterfeit substance."

The legislative history indicates that Congress was concerned with the nature of the drug transaction, rather than with the status of the defendant. The penalties now embodied in §§ 841–843 originated in §§ 501–503 of the Controlled Dangerous Substances Act of 1969. The Report of the Senate Judiciary Committee on that bill described § 501 (the counterpart of § 841) as applying to "traffickers." S. Rep. No. 91–613, p. 8

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quota." §§ 842 (b)(1), (2). Nor would there be any reason to apply to nonregistrants the penalties for distributing drugs without complying with the labeling and order-form requirements of the Act, §§ 842 (a)(3), 843 (a)(1), for nonregistrants are barred from making any distributions whatsoever.

[11] Another subsection which can be sensibly interpreted only if it reaches nonregistrants is § 842 (a)(1), which is limited to "any person—who is subject to the requirements of part C." Part C of the Act, §§ 821–829, covers the provisions for registration and applies to "[e]very person who manufactures, distributes, or dispenses any controlled substance or who proposes" to do so. § 822 (a). Presumably, § 842 (a)(1) is so phrased in order to reach those who should have registered but failed to do so.

(1969). Section 502 provided "[a]dditional penalties . . . for those involved in the legitimate drug trade," and "[f]urther penalties . . . for registrants" were specified in § 503. S. Rep. No. 91–613, p. 9. The House Committee Report on the bill that was to become the CSA explains: "The bill provides for control . . . of problems related to drug abuse through registration of manufacturers, wholesalers, retailers, and all others in the legitimate distribution chain, and makes transactions outside the legitimate distribution chain illegal." H. R. Rep. No. 91–1444, p. 3. Although this language is ambiguous, the most sensible interpretation is that the penalty to be imposed for a violation was intended to turn on whether the "transaction" falls within or without legitimate channels. All persons who engage in legitimate transactions must be registered and are subject to penalties under §§ 842 and 843 for "[m]ore or less technical violations." H. R. Rep. No. 91–1444, p. 10. But "severe criminal penalties" were imposed on those, like respondent, who sold drugs, not for legitimate purposes, but "primarily for the profits to be derived therefrom." *Ibid.*

C

Congress was particularly concerned with the diversion of drugs from legitimate channels to illegitimate channels. *Id.*, at 6; S. Rep. No. 91–613, p. 4; 116 Cong. Rec. 996 (1970) (remarks of Sen. Dodd). It was aware that registrants, who have the greatest access to controlled substances and therefore the greatest opportunity for diversion, were responsible for a large part of the illegal drug traffic. See *id.*, at 1663 (remarks of Sen. Hruska); *id.*, at 998 (remarks of Sen. Griffin).

Recognizing this concern the Court of Appeals suggested that Dr. Moore could be prosecuted under § 842

(a)(1) for having violated the provisions of § 829 with respect to the issuing of prescriptions.[12] Whether Dr. Moore could have been so prosecuted is not before the

[12] Section 829 provides, in part:

"(a) Schedule II substances.

"Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 353 (b) of this title. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

"(b) Schedule III and IV substances.

"Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 353 (b) of this title. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

"(c) Schedule V substances.

"No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose."

The Attorney General's regulations enacted pursuant to § 829 required:

"A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of

Court.[13] We note, however, that the penalties for such a violation could hardly have been deemed by Congress to be an appropriate sanction for drug trafficking by a registered physician. Indeed, the penalty for conviction under § 842 would be significantly lighter than, for example, that applicable to a registrant convicted under § 843 for using a suspended registration number.[14] Moreover, a physician who wished to traffic in drugs without threat of criminal prosecution could, if violation of § 829 were the sole basis for prosecution, simply dispense drugs directly without the formality of issuing a prescription. Direct dispensing is exempt from § 829 and thus is not reached by any subsection of § 842 or

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section 309 of the Act (21 U. S. C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." 21 CFR § 306.04 (a) (1973) (redesignated as 21 CFR § 1306.04 (a) (1975)).

The court below suggested that a violation of the "medical purpose" requirement of § 306.04 (a) makes a prescription something other than the "written prescription" required by § 829. The dissent, which agreed that Dr. Moore could be prosecuted under § 842 (a)(1), did not rely on the regulations. It found inherent in the statutory term "prescription" a requirement that the order be issued for a valid medical purpose.

[13] On its face § 829 addresses only the form that a prescription must take. A written prescription is required for Schedule II substances. § 829 (a). Either a written or an oral prescription is adequate for drugs in Schedules III and IV. § 829 (b). The only limitation on the distribution or dispensing of Schedule V drugs is that it be "for a medical purpose." § 829 (c). The medical purpose requirement explicit in subsection (c) could be implicit in subsections (a) and (b). Regulation § 306.04 makes it explicit. But § 829 by its terms does not limit the authority of a practitioner.

[14] In addition, a doctor who dispenses a controlled substance not authorized by his registration to another registrant is also covered by § 842 and would thus be punished as severely as a doctor who sold drugs solely for financial profit to nonregistrants. § 842 (a)(2).

§ 843 so long as the technical requirements are complied with.

But we think it immaterial whether Dr. Moore also could have been prosecuted for his violation of statutory provisions relating to dispensing procedures. There is nothing in the statutory scheme or the legislative history that justifies a conclusion that a registrant who may be prosecuted for the relatively minor offense of violating § 829 is thereby exempted from prosecution under § 841 for the significantly greater offense of acting as a drug "pusher." [15]

III

Respondent argues that even if Congress did not intend to exempt registrants from all prosecutions under § 841, he cannot be prosecuted under that section because the specific conduct for which he was prosecuted was "authorized by [the] subchapter" and thus falls within the express exemption of the section.

The trial judge assumed that a physician's activities are authorized only if they are within the usual course of professional practice. He instructed the jury that it had to find

> "beyond a reasonable doubt that a physician, who knowingly or intentionally, did dispense or distribute

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[15] Respondent argues that the proper sanction for trafficking physicians is not criminal prosecution, but deregistration or refusal to reregister. But, under respondent's analysis, at the time he was convicted neither penalty could be imposed as a sanction for the conduct in which he engaged. Registration was mandatory for practitioners with state licenses, § 823 (f), and could only be suspended or revoked if the state license was revoked or suspended, if the practitioner had "materially falsified" an application under the Act, or if he had been convicted of a drug-related felony. § 824 (a). Conviction for a misdemeanor under § 842 would be insufficient to support revocation.

> [methadone] by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." App. 123.

The Court of Appeals did not address this argument because it concluded that registrants could not be prosecuted under § 841 under any circumstances. But it suggested that if a registrant could be reached under § 841 he could not be prosecuted merely because his activities fall outside the "usual course of practice." 164 App. D. C., at 322 n. 11, 505 F. 2d, at 429 n. 11.

Under the Harrison Act physicians who departed from the usual course of medical practice were subject to the same penalties as street pushers with no claim to legitimacy. Section 2 of that Act required all persons who sold or prescribed certain drugs to register and to deliver drugs only to persons with federal order forms. The latter requirement did not apply to "the dispensing or distribution of any of the aforesaid drugs to a patient by a physician . . . registered under this Act in the course of his professional practice only." 38 Stat. 786. As noted above, Congress intended the CSA to strengthen rather than to weaken the prior drug laws. There is no indication that Congress intended to eliminate the existing limitation on the exemption given to doctors.[16] The difficulty

[16] The Narcotic Addict Treatment Act of 1974 (NATA), 88 Stat. 124, 21 U. S. C. §§ 802, 823, 824 (1970 ed., Supp. IV), modified the registration and revocation procedures provided in the CSA in order to facilitate "more expeditious" criminal prosecutions by making revocation easier.

There was no indication that Congress thought that trafficking doctors could escape felony prosecution altogether under pre-NATA law. Rather, it sought to "cure the present difficulty in such prosecutions because of the intricate and nearly impossible burden of establishing what is beyond 'the course of professional practice' for

arises because the CSA, unlike the Harrison Act, does not spell out this limitation in unambiguous terms.

Instead of expressly removing from the protection of the Act those physicians who operate beyond the bounds of professional practice, the CSA uses the concept of "registration." Section 822 (b) defines the scope of authorization under the Act in circular terms: "Persons registered . . . under this subchapter . . . are authorized [to dispense controlled substances] . . . to the extent authorized by their registration and in conformity with the other provisions of this subchapter." But the scheme of the statute, viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority to the course of his "professional practice."

Registration of physicians and other practitioners [17] is mandatory if the applicant is authorized to dispense drugs or conduct research under the law of the State in which he practices.[18] § 823 (f). In the case of a physi-

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criminal law purposes when such a practitioner speciously claims that the practices in question were ethical and humanitarian in nature." S. Rep. No. 93–192, p. 14 (1973). Dr. Moore's conviction was cited to illustrate that successful criminal actions could be brought only "in the most aggravated of circumstances . . . after prolonged effort to make undercover penetrations." *Id.*, at 13.

[17] "Practitioner" means "a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research." § 802 (20).

[18] Under § 823, registration of manufacturers and nonpractitioner distributors (such as suppliers) is discretionary with the Attorney General. He first must make a finding that registration is consistent (in the case of manufacturers of Schedule I and II drugs) or not inconsistent (in the case of manufacturers of Schedule III–V

cian this scheme contemplates that he is authorized by the State to practice medicine and to dispense drugs in connection with his professional practice.[19] The federal registration, which follows automatically, extends no further. It authorizes transactions within "the legitimate distribution chain" and makes all others illegal. H. R. Rep. No. 91–1444, p. 3. Implicit in the registration of a physician is the understanding that he is authorized only to act "as a physician."

This is made explicit in § 802 (20), which provides that "practitioner" means one who is "registered . . . by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research." This section defines the term "practitioner" for purposes of the Act. It also describes the type of registration contemplated by the Act. That registration is limited to the dispensing and use of drugs "in the course of professional practice or research."

Other provisions throughout the Act reflect the in-

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drugs and all distributors) with the public interest. In evaluating the public interest the Attorney General is to consider, for example, "maintenance of effective controls against diversion," compliance with applicable state and local law, prior conviction record in drug-related charges, past experience, and (in the case of manufacturers) promotion of technical advances in manufacturing and the development of new substances. Practitioners and pharmacies are automatically entitled to registration to handle drugs in Schedules II–V "if they are authorized to dispense . . . under the law of the State in which they practice." § 823 (f).

[19] The House Report described the rationale behind § 823 (f) as follows: "Practitioners . . . engaged in the distribution chain would be required to be registered, but registration would be as a matter of right where the individual or firm is engaged in *activities* involving these drugs which are authorized or permitted under State law . . . ." H. R. Rep. No. 91–1444, p. 23 (1970) (emphasis added).

tent of Congress to confine authorized medical practice within accepted limits. Section 812 (b)(2) includes in its definition of Schedule II drugs a requirement that "[t]he drug [have] a currently accepted medical use with severe restrictions." Registration under the CSA to dispense or to conduct research with Schedule I drugs, which are defined as having "no currently accepted medical use in treatment in the United States," § 812 (b)(1)(B), does not follow automatically from state registration as it does with respect to drugs in Schedules II through V, all of which have some accepted medical use. § 823 (f). The record and reporting requirements of § 827 are made inapplicable with respect to narcotic drugs in Schedules II through V when they are prescribed or administered "by a practitioner in the lawful course of his professional practice." § 827 (c)(1)(A). Section 828 (a) prohibits the distribution of Schedule I and II drugs unless pursuant to specified order forms; § 828 (e) makes it unlawful for "any person" to obtain drugs with these order forms "for any purpose other than their use, distribution, dispensing, or administration in the conduct of a lawful business in such substances or in the course of his professional practice or research." Section 844 (a) prohibits possession of controlled substances unless the drug was obtained "from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized . . . ." See also § 885 (a)(2).

The evidence presented at trial was sufficient for the jury to find that respondent's conduct exceeded the bounds of "professional practice." [20] As detailed above, he gave inadequate physical examinations or none at all.

[20] The jury was instructed that Dr. Moore could not be convicted if he merely made "an honest effort" to prescribe for detoxification in compliance with an accepted standard of medical practice. App. 124.

He ignored the results of the tests he did make. He did not give methadone at the clinic and took no precautions against its misuse and diversion. He did not regulate the dosage at all, prescribing as much and as frequently as the patient demanded. He did not charge for medical services rendered, but graduated his fee according to the number of tablets desired. In practical effect, he acted as a large-scale "pusher"—not as a physician.

IV

Respondent further contended at trial that he was experimenting with a new "blockade" theory of detoxification. The jury did not believe him. Congress understandably was concerned that the drug laws not impede legitimate research and that physicians be allowed reasonable discretion in treating patients and testing new theories. But respondent's interpretation of the Act would go far beyond authorizing legitimate research and experimentation by physicians. It would even compel exemption from the provisions of § 841 of all "registrants," including manufacturers, wholesalers, and pharmacists—in addition to physicians.

In enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, Title II of which is the CSA, Congress faced the problem directly. Because of the potential for abuse it decided that some limits on free experimentation with drugs were necessary. But it was also aware of the concern expressed by the Prettyman Commission:

> "[A] controversy has existed for fifty years over the extent to which narcotic drugs may be administered to an addict solely because he is an addict.
>
> . . . . .
>
> "The practicing physician has . . . been confused as to when he may prescribe narcotic drugs for an

> addict. Out of a fear of prosecution many physicians refuse to use narcotics in the treatment of addicts except occasionally in a withdrawal regimen lasting no longer than a few weeks. In most instances they shun addicts as patients." [21]

Congress' solution to this problem is found in § 4 of Title I of the 1970 Act, 42 U. S. C. § 257a. That section requires the Secretary of Health, Education, and Welfare, after consultation with the Attorney General and national addict treatment organizations, to "determine the appropriate methods of professional practice in the medical treatment of . . . narcotic addiction . . . ." It was designed "to clarify for the medical profession . . . the extent to which they may safely go in treating narcotic addicts as patients." H. R. Rep. No. 91–1444, p. 14. Congress pointed out that "criminal prosecutions" in the past had turned on the opinions of federal prosecutors. Under the new Act, "[t]hose physicians who comply with the recommendations made by the Secretary will no longer jeopardize their professional careers . . . ." *Id.*, at 15. The negative implication is that physicians who go beyond approved practice remain subject to serious criminal penalties.

In the case of methadone treatment the limits of approved practice are particularly clear. As Dr. Moore admitted at trial,[22] he was authorized only to dispense methadone for detoxification purposes. His authorization by the FDA to engage in a methadone maintenance program had been revoked. Nor was respondent unfamiliar with the procedures for conducting a legitimate detoxification program. Charges arising

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[21] Report of the President's Advisory Commission on Narcotic and Drug Abuse 56–57 (1963), quoted in H. R. Rep. No. 91–1444, pp. 14–15.

[22] App. 101.

out of his 1969 treatment program, which involved a combination of "long term" and "short term" detoxification, were dropped after he testified before a grand jury and agreed to abide by certain medical procedures in future methadone programs. These included obtaining a medical history of each patient, conducting a reasonably thorough physical examination, abiding by the results of urine tests, recording times and amounts of dosages, and either administering the methadone in his office or prescribing no more than a daily dosage.[23] At trial respondent admitted that he had failed to follow these procedures.[24]

V

Respondent argues finally that the statute is sufficiently ambiguous that it must be construed in his favor despite the clear intent of the Congress. It is true that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952). In this case, however, the principle set forth in *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948), is appropriately followed:

> "The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."

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[23] *Id.*, at 97–100, 116, 136–138.

[24] *Id.*, at 97–100.

The judgment of the Court of Appeals is reversed. Because of its disposition of the case, that court did not reach the question whether respondent could be sentenced under 21 U. S. C. § 845, which provides a higher penalty for distribution of controlled substances to persons under 21 years of age. We remand for the sole purpose of considering respondent's claim that he was improperly sentenced under that section.

So ordered.

WEINSTEIN ET AL. *v.* BRADFORD

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74–1287. Decided December 10, 1975

Where respondent was paroled after the Court of Appeals upheld his claim in his action against petitioner parole board members that he was constitutionally entitled to certain procedural rights in connection with petitioners' consideration of his eligibility for parole, the case is moot and does not present an issue "capable of repetition, yet evading review," since the action is not a class action and there is no demonstrated probability that respondent will again be subjected to the parole system. *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115, distinguished.

519 F. 2d 728, vacated and remanded.

PER CURIAM.

Respondent Bradford sued petitioner members of the North Carolina Board of Parole in the United States District Court for the Eastern District of North Carolina, claiming that petitioners were obligated under the Fourteenth Amendment of the United States Constitution to accord him certain procedural rights in considering his eligibility for parole. Although respondent sought certification of the action as a class action, the District Court refused to so certify it and dismissed the complaint. On respondent's appeal to the Court of Appeals for the Fourth Circuit, that court sustained his claim that he was constitutionally entitled to procedural rights in connection with petitioners' consideration of his application for parole. Because the conclusion of the Court of Appeals was at odds with the decisions of several other Courts of Appeals, we granted certiorari on June 2, 1975, 421 U. S. 998, and the case was set for oral argument during the December calendar of this Court.

Respondent has now filed a suggestion of mootness

with this Court, and petitioners have filed a response. It is undisputed that respondent was temporarily paroled on December 18, 1974, and that this status ripened into a complete release from supervision on March 25, 1975. From that date forward it is plain that respondent can have no interest whatever in the procedures followed by petitioners in granting parole.

Conceding this fact, petitioners urge that this is an issue which is "capable of repetition, yet evading review" as that term has been used in our cases dealing with mootness. Petitioners rely on *Super Tire Engineering Co.* v. *McCorkle*, 416 U. S. 115 (1974), to support their contention that the case is not moot. But there the posture of the parties was quite different. Petitioner employer was engaged in cyclically recurring bargaining with the union representing its employees, and respondent state official was continuously following a policy of paying unemployment compensation benefits to strikers. Even though the particular strike which had been the occasion for the filing of the lawsuit was terminated, the Court held that it was enough that the petitioner employer showed "the existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest," and noted that "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender." *Id.*, at 125–126. But in the instant case, respondent, who challenged the "governmental action or policy" in question, no longer has any present interest affected by that policy.

In *Sosna* v. *Iowa*, 419 U. S. 393 (1975), we reviewed in some detail the historical developments of the mootness doctrine in this Court. *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911), was the first case to enunciate the "capable of repetition, yet evading review"

branch of the law of mootness. There it was held that because of the short duration of the Interstate Commerce Commission order challenged, it was virtually impossible to litigate the validity of the order prior to its expiration. Because of this fact, and the additional fact that the same party would in all probability be subject to the same kind of order in the future, review was allowed even though the order in question had expired by its own terms. This case was followed by *Moore* v. *Ogilvie,* 394 U. S. 814 (1969); *SEC* v. *Medical Committee for Human Rights,* 404 U. S. 403 (1972); and *Dunn* v. *Blumstein,* 405 U. S. 330 (1972), which applied the original concept of *Southern Pacific Terminal Co.* v. *ICC* to different fact situations, including a class action in *Dunn.*

Sosna decided that in the absence of a class action, the "capable of repetition, yet evading review" doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again. The instant case, not a class action, clearly does not satisfy the latter element. While petitioners will continue to administer the North Carolina parole system with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number. *O'Shea* v. *Littleton,* 414 U. S. 488 (1974).

It appearing, therefore, that the case is moot, the judgment of the Court of Appeals is vacated, and the case is remanded to the District Court with instructions to dismiss the complaint. *Indianapolis School Comm'rs* v. *Jacobs,* 420 U. S. 128 (1975); *United States* v. *Munsingwear, Inc.,* 340 U. S. 36 (1950).

So ordered.

AMERICAN FOREIGN STEAMSHIP CO. *v.* MATISE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–966. Argued October 14, 1975—Decided December 16, 1975

Respondent's decedent, a seaman, was discharged for misconduct from petitioner's ship while it was docked in South Vietnam. Because of South Vietnamese currency regulations and other complications precluding paying the seaman in American currency the wages due him that he had earned prior to his discharge, petitioner purchased for him an airline ticket to the United States for $510, and this ticket, together with a wage voucher for $118.45, representing wages due less the $510, were given to him. When the seaman arrived back in the United States he received the $118.45. Subsequently he sued petitioner, claiming that it had withheld $510 in wages from him. He contended that petitioner was liable to him for the $510, and for an added sum pursuant to 46 U. S. C. § 596, which requires the master or owner of a vessel making foreign voyages to pay a discharged seaman his wages within four days after the discharge, and, upon refusal or neglect to make such payment "without sufficient cause," to pay the seaman a sum equal to two days' pay for every day during which payment is delayed. Finding that the seaman had consented to the purchase of the airline ticket for his purposes with his money and that such purchase therefore constituted a partial payment of wages, the District Court held that petitioner had not refused or neglected to pay and hence was not liable under § 596. The Court of Appeals reversed, holding that § 596 requires that wage payments be made directly to the seaman and that therefore the $510 paid to the airline could not be regarded as a partial payment of wages. On remand, the District Court assessed damages pursuant to § 596, and the Court of Appeals dismissed an appeal from this assessment. *Held:* Under the circumstances, the transaction resulting in the seaman's receipt of an airline ticket purchased with money owed to him as wages constituted a payment of wages, and therefore there was no refusal or neglect to make payment, and hence no liability, under § 596. *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, distinguished. Since the transaction was a partial payment of wages and *not* a "de-

duction from" wages, the requirement of 46 U. S. C. § 642 that a ship's master enter wage deductions in the logbook does not apply, and thus the master's failure to make a logbook entry that the $510 had been paid does not bar viewing the transaction as a partial payment of wages. Pp. 156–160.

Reversed and remanded; see 488 F. 2d 469.

MARSHALL, J., delivered the opinion for a unanimous Court.

Francis L. Tetreault argued the cause for petitioner. With him on the brief was *John A. Flynn.*

Eric J. Schmidt argued the cause and submitted a brief for respondent.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Granville C. Matise, a seaman, brought this suit alleging that upon his discharge from the S. S. *American Hawk,* petitioner, the ship's owner, withheld $510 in wages from him. Matise claimed that, pursuant to Rev. Stat. § 4529, as amended, 46 U. S. C. § 596, he was entitled to two days' pay for every day that payment of the $510 had been delayed.

Title 46 U. S. C. § 596 provides in relevant part:

> "The master or owner of any vessel [making foreign voyages] shall pay to every seaman his wages . . . within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens . . . . Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

The parties to this case differ over the meaning of "sufficient cause" under § 596; they are in conflict, too, over whether the trial court can exercise any discretion in determining the amount of the award under § 596.[1] But we need not address either of these questions today. We hold simply that in this case the District Court correctly concluded that petitioner-shipowner never "refuse[d] or neglect[ed] to make payment" to Matise. This being so, petitioner incurred no liability under § 596.

I

Granville Matise was hired on January 11, 1969, as a seaman aboard the S. S. *American Hawk*. Between February 14 and March 19, 1969, there were five occasions on which the ship's master entered in the ship's log reports that Matise either was absent from his duty position or, because of intoxication, was unable to fulfill his normal responsibilities. On the first four occasions relatively minor penalties of the loss of several days' pay were imposed. On March 19, the date of the fifth log entry, the master decided that Matise should be discharged. With the ship docked in Saigon, South Vietnam, the master took Matise before the United States Vice Consul stationed in Saigon. The Vice Consul,

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[1] While the Third and Ninth Circuits have found that the trial judge has no discretion in determining the amount of the penalty under § 596, *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81 (CA3 1966); *Escobar* v. *S. S. Washington Trader*, 503 F. 2d 271 (CA9 1974), cert. pending *sub nom. American Trading Transp. Co.* v. *Escobar*, No. 74-1184, the First, Second, Fourth, and Fifth Circuits have concluded that the length of time to which the penalty applies—and hence its amount—is subject to the discretion of the District Court. *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310 (CA1 1950); *Forster* v. *Oro Navigation Co.*, 228 F. 2d 319 (CA2 1955), aff'g 128 F. Supp. 113 (SDNY 1954); *Southern Cross S. S. Co.* v. *Firipis*, 285 F. 2d 651 (CA4 1960), cert. denied, 365 U. S. 869 (1961); *Caribbean Federation Lines* v. *Dahl*, 315 F. 2d 370 (CA5 1963).

whose duty in such situations is to "inquire carefully into the facts and circumstances, and [to] satisfy himself that good and substantial reasons exist for a discharge," 22 CFR § 82.16,[2] agreed with the master that Matise's discharge was justified. He granted the discharge application without objection from Matise, and entered into the ship's log a notation stating that he "agreed to remove [Matise] from the vessel on grounds of misconduct at the Master's request and for the good of the vessel." The Vice Consul also advised the master that, because the discharge resulted from repeated instances of misconduct by Matise, petitioner was not obligated to pay for Matise's repatriation.[3]

Petitioner did, of course, have an obligation to pay Matise the wages that he had earned prior to his discharge. See 46 U. S. C. § 596. But payment in a form enabling Matise to secure transportation back to the United States was no easy matter. South Vietnamese law prohibited American seamen from carrying American currency ashore, and required that any ship's safe containing American currency be sealed while the ship was in port. An airline ticket to the United States, however, could be purchased only with American currency. Thus, Matise could not simply be put ashore with his wages and left there to secure transportation back to the United States for himself.[4]

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[2] See also 46 U. S. C. § 682; 7 Foreign Affairs Manual § 526.2.

[3] Two Coast Guard officers with whom the master had earlier consulted concerning Matise's misconduct were also present and concurred in the Vice Consul's advice that there was no obligation of repatriation.

[4] South Vietnamese currency regulations were apparently not the only barrier to simply discharging Matise with his full wages in cash in Saigon. The Court of Appeals noted that South Vietnamese law also required the shipowner to guarantee the removal from the country of all persons whom it had transported to South Vietnam. 488 F. 2d 469, 471–472.

In order to resolve the resulting dilemma, Vietnamese Customs officials gave the ship's master special permission to break the seal on the ship's safe and to remove enough money to purchase an airline ticket to the United States. The ticket was purchased and given to Matise along with a wage voucher for $118.45—a sum which, as indicated on the voucher itself, represented the amount of the wages due him, less the $510 paid for the airline ticket.[5] When Matise arrived back in the United States, he signed off the ship's articles, executed a mutual release,[6] and, on March 24, 1969, received the $118.45 from petitioner.

Almost one year later Matise filed suit against petitioner in the United States District Court for the Northern District of California.[7] He claimed that petitioner had withheld from him $510 in wages, and that petitioner was liable to him for that amount and, as provided in § 596, for two days' pay for every day that payment had been delayed. The District Court rejected Matise's claim, finding that he had "consented to and approved the purchase of an airline ticket for his purposes with his money," and concluding that "[t]he purchase of that ticket under those circumstances constituted the

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[5] Apart from the airline ticket expense, several deductions, none of them here at issue, were also reflected on the wage voucher.

[6] Such a release is required by 46 U. S. C. § 644. Once such a release is signed, it "shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement," § 644, except that "any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require." § 597.

[7] Granville Matise died during the pendency of the suit. Lillian M. Matise, respondent in this case, was appointed by the State of Maryland to administer his estate. Pursuant to stipulation, the District Court substituted respondent as plaintiff in this action.

equivalent of payment of monies over to the seaman." Having found that the purchase of the airline ticket for $510 constituted a partial payment of wages, the District Court concluded that petitioner had not "refuse[d] or neglect[ed]" to pay and had therefore incurred no liability under § 596.

The Court of Appeals for the Ninth Circuit reversed. 488 F. 2d 469 (1974). It read § 596 as requiring that wage payments be paid directly to the seaman, and held that the $510 paid to the airline without ever having passed through Matise's hands could not be regarded as a partial payment of wages. Citing this Court's indication in *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779 (1952), that only deductions and setoffs for derelictions of duty specifically provided for by Congress could lawfully be deducted from a seaman's wages, the Court of Appeals concluded that since the statutory scheme does not provide for setoffs for return transportation expenses, the "withholding" here at issue was improper and was without "sufficient cause" under § 596.

On remand, the District Court assessed damages in the amount of $510 for the wages "wrongfully withheld" and $29,462 in penalties,[8] representing double wages calculated from March 24, 1969, four days after the discharge, until December 15, 1971, the date of the first District Court judgment in the case.[9] Petitioner's appeal from this assessment was dismissed by the Court of Appeals as frivolous, and this Court thereupon granted certiorari. 420 U. S. 971 (1975). We reverse.

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[8] The District Court also held petitioner liable for interest on these sums, as well as for court costs in both the District Court and Court of Appeals.

[9] The District Court assessment was made in conformity with *Escobar* v. *S. S. Washington Trader*. See n. 1, *supra*.

II

The threshold question in this case is whether petitioner's purchase and Matise's receipt of the airline ticket constituted a partial payment of wages. If it was a partial payment, then there was no refusal or neglect to pay wages and there can be no double-wage liability under § 596.[10] Only if the transaction was not a partial payment are we presented with the question whether the "withholding" of the $510 was without "sufficient cause" under § 596.

In *Isbrandtsen Co.* v. *Johnson, supra,* on which the Court of Appeals heavily relied, there was no question that what this Court was faced with was a refusal or neglect to make payment. There respondent, a seaman, had stabbed one of his shipmates while at sea. Over respondent's objection, the shipowner deducted from his wages amounts spent for the medical care and hospitalization of the shipmate. We held that because the deductions were not provided for in the relevant statutes,[11] they should not have been made—even though it might later have been determined that the shipowner had a valid claim for reimbursement against the respondent.

The situation before us today is quite different from that in *Isbrandtsen.* While the deductions in *Isbrandtsen* were made over the seaman's objection, the District Court in this case explicitly found that Matise "consented to and approved the purchase of an airline ticket for his purposes with his money."[12] Moreover, unlike

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[10] Respondent conceded as much at oral argument before this Court. See Tr. of Oral Arg. 27, 31.

[11] 46 U. S. C. §§ 659, 663, 701, 707.

[12] The Court of Appeals rejected the District Court's finding that Matise had consented to the purchase of the airline ticket with part of the wages due him, in part because of its conclusion that Matise

the seaman in *Isbrandtsen,* Matise received a benefit from the petitioner's expenditure that he simply could not have obtained through being paid in cash.[13] Because of South Vietnamese currency regulations, it was only the procedure that was followed that allowed Matise to secure air transportation to the United States. Under such circumstances, it is evident that the shipowner did not refuse or neglect to make payment under § 596 as the shipowner in *Isbrandtsen* so clearly did; [14] rather, the

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was "compelled to sign the release and Wage Voucher in order to receive the remainder of his wages that admittedly were due." 488 F. 2d, at 473. But there is nothing in the record to indicate that Matise's signing the wage voucher and release was the product of any such compulsion. Indeed, no claim is made that Matise registered any dissatisfaction whatsoever with either the form or amount of his wages until some months after signing the release. Nor was he the subject of any fraud or misrepresentation. See n. 14, *infra.* Accordingly, the District Court's finding that Matise had consented to and approved the form and amount of his wage payment was not clearly erroneous and should have been respected by the Court of Appeals.

[13] To the extent that the respondent in *Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779 (1952), was ultimately liable for the expenses surrounding his shipmate's injury, he too could be said to have benefited from the shipowner's payment of those expenses. However, unlike the case before us today, this was a "benefit" that he could have secured for himself had he been paid the wages directly.

[14] Any suggestion that on Matise's discharge petitioner had a repatriation obligation to him independent of the obligation to pay wages is without merit. That this is so follows from respondent's concession that the discharge was validly based on Matise's misconduct. A shipowner's obligation to repatriate a seaman discharged in a foreign port depends on the circumstances of the discharge. For instance, there is a general obligation to repatriate seamen who, through causes other than their own misconduct, have been injured. See *Ladzinski* v. *Sperling S. S. & Trading Corp.,* 300 F. Supp. 947, 956 (SDNY 1969); *Miller* v. *United States,* 51 F. Supp. 924 (SDNY 1943); *The Centennial,* 10 F. 397 (ED La. 1881); 1 M. Norris, The Law of Seamen § 418 (1970). On the other hand, as

transaction in question constituted a partial payment of Matise's wages.

The Court of Appeals rejected petitioner's attempt to treat the giving of the plane ticket to Matise as a payment of wages. It viewed the purchase of the ticket as a payment to the airline, not to Matise, and observed that "the applicable statutes explicitly and unequivocally provide that the wages due are to be paid *to the seaman*, 46 U. S. C. §§ 596–597." 488 F. 2d, at 471 (emphasis in original). The Court was evidently relying at this point on the following language in § 596: "The master . . . shall pay *to every seaman* his wages . . . within four days after the seaman has been discharged . . . ." [15] (Emphasis added.)

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the Court of Appeals recognized in this case, 488 F. 2d, at 471, there is no obligation to repatriate a seaman like Matise who has been discharged for misconduct. 1 Norris, *supra*, § 420. See *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 731 (1943).

Nothing in *Isbrandtsen* suggests that when a seaman concedes that his discharge for misconduct is warranted, the shipowner must pay for the seaman's repatriation and only later claim reimbursement from him. It is true that *Isbrandtsen* indicated that, because of the importance of repatriation allowances to seamen, amounts not deductible from earned wages may not be deducted from a repatriation allowance that is owing to a seaman. 343 U. S., at 789 n. 12. But in this case, we are presented, not with a deduction from a repatriation allowance that was owed to Matise, but rather, because of the nature of Matise's discharge, with the *absence* of any obligation at all on the part of the shipowner toward Matise to repatriate him. The Vice Consul's advice to the master, see *supra*, at 153, that petitioner had no obligation—even of a temporary nature—to pay for Matise's return to the United States was correct. It follows that Matise's consent to partial payment was not, as the Court of Appeals indicated, 488 F. 2d, at 473, the product of misinformation.

[15] The Court of Appeals' reference to § 597 was apparently to the following language:

"*Every seaman* . . . shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the

The Court of Appeals' conclusion that the "payment" went to the airline and not to Matise does not necessarily follow from the facts of this case. It could as easily be argued that "payment," albeit in the form of an airline ticket rather than cash, was made to Matise. But even under the Court of Appeals' characterization of the transaction, we are unwilling to say that the payment was precluded by the general language of § 596. A far more explicit statement would be required to bar such a payment under the peculiar circumstances of this case. The obvious concern of § 596 is that the shipowner not unlawfully withhold wages, and thereby unjustly enrich himself while wrongfully denying the seaman the benefits of his labor. In this case, there was neither unjust enrichment of the shipowner nor a denial of benefits to the seaman. The shipowner made in a timely manner all the expenditures for which it was obligated. And the seaman received full benefit from the $510 by consenting to have it applied in the fashion most useful to him—the purchase of an airline ticket.

Respondent advanced an alternative theory during oral argument to support the contention that petitioner neglected to make payment under § 596. Respondent argued that the master's failure to enter into the ship's logbook a notation that the $510 had been paid bars viewing the transaction as a partial payment of wages.

We find this argument unpersuasive. When crew members become liable for deductions from wages dur-

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balance of his wages . . . at the time when such demand is made at every port where such vessel . . . shall load or deliver cargo before the voyage is ended . . . ." 46 U. S. C. § 597 (emphasis added).

For reasons identical to those presented with regard to § 596, we reject any reading of § 597 that bars the method of payment utilized in this case.

ing a ship's voyage, there is, it is true, a statutory requirement that "the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official log book." 46 U. S. C. § 642. As we have indicated above, however, the airline ticket transaction in this case is *not* a "deduction from" Matise's wages, but rather is itself a partial payment of wages. Section 642's terms do not apply to payments of wages. The shipowner therefore acted properly in doing no more than rendering Matise a complete wage voucher that clearly noted the purchase of the airline ticket.

III

In reversing the decision of the Court of Appeals, we do not retreat from our view that the aim of § 596 is "to protect [seamen] from the harsh consequences of arbitrary and unscrupulous action[s] of their employers." *Collie* v. *Fergusson*, 281 U. S. 52, 55 (1930). In this case, there was no impropriety either in the discharge itself or in the payment of wages to Matise. Nor do we today compromise our holding in *Isbrandtsen* that "only such deductions and set-offs for derelictions in the performance of . . . duties shall be allowed against . . . wages as are recognized in the statutes." 343 U. S., at 787. We hold simply that, under the circumstances of this case, the transaction resulting in Matise's receipt of an airline ticket purchased with money owed to him as wages constituted a payment of wages. There was therefore no refusal or neglect to make payment under § 596.

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

LAING *v.* UNITED STATES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–1808. Argued January 21, 1975—Reargued October 15, 1975—Decided January 13, 1976*

These cases involve two income-tax payers whose taxable years were terminated by the Internal Revenue Service (IRS) prior to their normal expiration dates pursuant to the jeopardy-termination provisions of § 6851 (a) (1) of the Internal Revenue Code of 1954 (Code), which allow the IRS immediately to terminate a taxpayer's taxable period when it finds that the taxpayer intends to commit any act tending to prejudice or render ineffectual the collection of his income tax for the current or preceding taxable year. Under § 6851 the tax is due immediately upon termination, and upon such termination the taxpayer's taxable year comes to a close. In each case, after the taxpayer failed to file a return or pay the tax assessed as demanded, the IRS levied upon and seized property of the taxpayer without having sent a notice of deficiency to the taxpayer, a jurisdictional prerequisite to a taxpayer's suit in the Tax Court for redetermination of his tax liability, and without having followed the other procedures mandated by § 6861 *et seq.* of the Code for the assessment and collection of a deficiency whose collection is in jeopardy. The Government contends that such procedures are inapplicable to a tax liability arising after a § 6851 termination because such liability is not a "deficiency" within the meaning of § 6211 (a) of the Code, where the term is defined as the amount of the tax imposed less any amount that may have been reported by the taxpayer on his return. In No. 73–1808 the District Court held that a deficiency notice is not required when a taxable period is terminated pursuant to § 6851 (a) (1), and dismissed the taxpayer's suit for injunctive and declaratory relief on the ground, *inter alia*, that it was prohibited by the Anti-Injunction Act, § 7421 (a) of the Code, and the Court of Appeals affirmed. In No. 74–75 the District Court granted the taxpayer injunctive relief, holding that the Anti-Injunction Act was inapplicable because of the IRS's failure to follow the pro-

*Together with No. 74–75, *United States et al.* v. *Hall*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

cedures of § 6861 *et seq.*, and the Court of Appeals affirmed. *Held:* Based on the plain language of the statutory provisions at issue, their place in the legislative scheme, and their legislative history, the tax owing, but not reported, at the time of a § 6851 termination is a deficiency whose assessment and collection is subject to the procedures of § 6861 *et seq.*, and hence because the District Director in each case failed to comply with these requirements, the taxpayers' suits were not barred by the Anti-Injunction Act. Pp. 169–185.

(a) Under the statutory definition of § 6211 (a), the tax owing and unreported after a jeopardy termination, which in these cases, as in most § 6851 terminations, is the full tax due, is clearly a deficiency, there being nothing in the definition to suggest that a deficiency can arise only at the conclusion of a 12-month taxable year and it being sufficient that the taxable period in question has come to an end and the tax in question is due and unreported. Pp. 173–175.

(b) To deny a taxpayer subjected to a jeopardy termination the opportunity to litigate his tax liability in the Tax Court, as would be the case under the Government's view that the unreported tax due after a jeopardy termination is not a deficiency and that hence a deficiency notice is not required, would be out of keeping with the thrust of the Code, which generally allows income-tax payers access to that court. Pp. 176–177.

(c) The jeopardy-assessment and jeopardy-termination provisions have long been treated in a closely parallel fashion, and there is nothing in the early codification of such provisions to suggest the contrary. Pp. 177–183.

No. 73–1808, 496 F. 2d 853, reversed and remanded; No. 74–75, 493 F. 2d 1211, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and POWELL, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 185. BLACKMUN, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 188. STEVENS, J., took no part in the consideration or decision of the cases.

Joseph S. Oteri reargued the cause for petitioner in No. 73–1808. With him on the brief were *Rudolph F. Pierce* and *Charlotte A. Perretta*. *Stuart A. Smith* reargued the

cause for the United States et al. in both cases. With him on the brief were *Solicitor General Bork* and *Assistant Attorney General Crampton. Donald M. Heavrin* reargued the cause and filed a brief for respondent in No. 74–75.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These companion cases involve two taxpayers whose taxable years were terminated by the Internal Revenue Service (IRS) prior to their normal expiration date pursuant to the jeopardy-termination provisions of § 6851 (a)(1) of the Internal Revenue Code of 1954 (Code), 26 U. S. C. § 6851 (a)(1).[1] Section 6851 (a)(1) allows the IRS immediately to terminate a taxpayer's taxable period when it finds that the taxpayer intends to do any act tending to prejudice or render ineffectual the collection of his income tax for the current or preceding tax-

[1] Section 6851 (a)(1) provides:

"If the Secretary or his delegate finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the income tax for the current or the preceding taxable year unless such proceedings be brought without delay, the Secretary or his delegate shall declare the taxable period for such taxpayer immediately terminated, and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any proceeding in court brought to enforce payment of taxes made due and payable by virtue of the provisions of this section, the finding of the Secretary or his delegate, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of jeopardy."

able year. Upon termination the tax is immediately owing and, after notice, the IRS may, and usually does, levy upon the taxpayer's property under § 6331 (a) of the Code, 26 U. S. C. § 6331 (a), to assure payment.

We must decide whether the IRS, when assessing and collecting the unreported tax due after the termination of a taxpayer's taxable period, must follow the procedures mandated by § 6861 *et seq.* of the Code, 26 U. S. C. § 6861 *et seq.*, for the assessment and collection of a deficiency whose collection is in jeopardy.[2] The answer, as we shall see, depends on whether the unreported tax due upon such a termination is a "deficiency" as defined in § 6211 (a) of the Code, 26 U. S. C. § 6211 (a) (1970 ed. and Supp. IV). The Government argues that the tax liability that arises after a § 6851 termination cannot be a "deficiency," and that the procedures for the assessment and collection of deficiencies in jeopardy are therefore inapplicable. We reject this argument. We agree with the taxpayers that any tax owing, but unreported, after a § 6851 termination is a deficiency, and that the assessment of that deficiency is subject to the provisions of § 6861 *et seq.* We reverse in No. 73–1808 and affirm in No. 74–75.

I

A. No. 73–1808, *Laing* v. *United States.* Petitioner James Burnett McKay Laing is a citizen of New Zea-

[2] Section 6861 (a) provides for the immediate assessment of deficiencies whose assessment or collection would otherwise be in jeopardy:

"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof."

land. He entered the United States from Canada on a temporary visitor's visa on May 31, 1972. On the following June 24, Mr. Laing and two companions sought to enter Canada from Vermont but were refused entry by Canadian officials. As they turned back, they were detained by United States customs authorities at Derby, Vt. Upon a search of the vehicle in which the three were traveling, the customs officers discovered in the engine compartment a suitcase containing more than $300,000 in United States currency. The IRS District Director found that petitioner Laing and his companions were in the process of placing assets beyond the reach of the Government by removing them from the United States, thereby tending to prejudice or render ineffectual the collection of their income tax.[3] He declared the taxable periods of petitioner and his companions immediately terminated under § 6851 (a). An assessment of $310,000 against each was orally asserted for the period from January 1 through June 24, 1972. The assessment against Mr. Laing was subsequently abated to the amount of $195,985.55 when a formal letter-notice of termination and demand for payment and the filing of a return were sent. Mr. Laing received no deficiency notice under § 6861 (b) and no specific information about how the amount of the tax was determined.[4]

After Mr. Laing and his companions refused to pay the tax, the IRS seized the currency that had been found

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[3] The Code provides that a § 6851 termination will be ordered by "the Secretary or his delegate," § 6851 (a). The Regulations provide that the District Director is in all cases authorized to make the required findings and order the termination. Treas. Reg. § 1.6851–1 (a)(1), 26 CFR § 1.6851–1 (a)(1) (1975).

[4] A deficiency notice is of import primarily because it is a jurisdictional prerequisite to a taxpayer's suit in the Tax Court for redetermination of his tax liability. See *infra*, at 171.

in the vehicle. A portion thereof was applied to the tax assessed against Mr. Laing.[5]

On July 15, petitioner filed suit against the United States, the Commissioner of Internal Revenue, the District Director, and the Chief of the Collection Division, District of Vermont, in the United States District Court for the District of Vermont. He asserted the absence of a notice of deficiency, which he claimed was required under § 6861 (b), and he challenged as violative of due process both the provisions of the levy and distraint statute, § 6331 (a), and the actions of the IRS in seizing and retaining the currency "without any finding of a substantial or probable nexus between that money and taxable income." App. in No. 73–1808, p. 20.[6]

The District Court, relying on its controlling court's decision in *Irving* v. *Gray*, 479 F. 2d 20 (CA2 1973), held that a notice of deficiency is not required when a taxable period is terminated pursuant to § 6851 (a)(1), and dismissed the suit as prohibited by the Federal Anti-Injunction Act, § 7421 (a) of the Code, 26 U. S. C. § 7421 (a), and as within the plain wording of the exception to the Declaratory Judgment Act, 28 U. S. C. § 2201, for a controversy with respect to federal taxes. 364 F. Supp. 469 (1973).

Adhering to its earlier ruling in *Irving*, the Second Circuit affirmed *per curiam*. 496 F. 2d 853 (1974). It expressly declined to follow the Sixth Circuit's decision in *Rambo* v. *United States*, 492 F. 2d 1060 (1974).[7] These rulings of the Second Circuit, and one of the

[5] Petitioner Laing has not denied ownership of the currency. Tr. of Oral Arg. 64; Tr. of Oral Rearg. 48.

[6] Petitioner Laing also has filed suit for refund in the United States District Court for the District of Vermont. Trial is being delayed, pursuant to stipulation of the parties, pending our decision in the present case.

[7] *Rambo* is before us as No. 73–2005, cert. pending.

Seventh Circuit, *Williamson* v. *United States*, 31 A. F. T. R. 2d 73–800 (1971), appeared to be in conflict with holdings by other Courts of Appeals, *Rambo* v. *United States, supra; Hall* v. *United States*, 493 F. 2d 1211 (CA6 1974); and *Clark* v. *Campbell*, 501 F. 2d 108 (CA5 1974).[8] Suggesting that the conflict was irreconcilable and noting that some 70 pending cases in the federal courts depended on its resolution, the Solicitor General did not oppose Mr. Laing's petition for certiorari. We granted certiorari to resolve the conflict.[9] 419 U. S. 824 (1974).

B. No. 74–75, *United States* v. *Hall*. Respondent Elizabeth Jane Hall is a resident of Shelbyville, Ky. After the arrest of her husband in Texas on drug-related charges, Kentucky state troopers obtained a warrant and searched respondent's home on January 31, 1973. They found controlled substances there. The next day the Acting District Director notified respondent Hall by letter that he found her "involved in illicit drug activities, thereby tending to prejudice or render ineffectual collection of income tax for the period 1–1–73 thru 1–30–73." App. in No. 74–75, p. 11. Citing § 6851, the Acting Director declared respondent's taxable period for the first 30 days of 1973 "immediately terminated" and her income tax for that period "immediately due and payable." *Ibid.* He further informed respondent that a tax in the amount of $52,680.25 for the period "will be immediately assessed" and that "[d]emand for immediate payment of the full amount of this tax is hereby made." *Ibid.* A return for the terminated period, pursuant to § 443 (a)(3) of the Code, 26 U. S. C. § 443

[8] Cert. pending *sub nom. United States* v. *Clark*, No. 74–722.

[9] The developing conflict among the federal courts was recognized in *Willits* v. *Richardson*, 497 F. 2d 240, 246 n. 4 (CA5 1974), and *Jones* v. *Commissioner*, 62 T. C. 1, 2–3 (1974).

(a)(3), was requested but not filed. The formal assessment was made on February 1. As was the case with Mr. Laing, Mrs. Hall received no deficiency notice under § 6861 (b) and no specific information about how the amount of the tax had been determined.

Respondent was unable to pay the tax so assessed. Therefore, the IRS, acting pursuant to § 6331, levied upon and seized respondent's 1970 Volkswagen and offered it for sale.[10]

Respondent Hall instituted suit on February 13 in the United States District Court for the Western District of Kentucky, seeking injunctive relief and compensatory and punitive damages. The court issued an order temporarily restraining the IRS from selling the automobile and from seizing any more of respondent's property. Thereafter, relying upon *Schreck* v. *United States*, 301 F. Supp. 1265 (Md. 1969), the court held that the Federal Anti-Injunction Act, § 7421 (a), was inapplicable because of the IRS's failure to follow the procedures of § 6861 *et seq.* The court ordered the return of respondent's automobile upon her posting a bond in the amount of its fair market value.[11] It issued a preliminary injunction restraining the defendants (the United States, the Acting District Director, the Group Supervisor of Internal Revenue, and a lieutenant of the Kentucky State Police) "from harassing or intimidating [respondent] in any manner including but not limited to trespassing on, seizing or levying upon any of her property of whatever nature, be it rental property or not." Pet. for Cert. in No. 74–75, p. 5a.

[10] Counsel for respondent Hall asserted that the IRS also "seized $57 from her bank account," and that it would, or did, seize her paycheck. Tr. of Oral Arg. 46. Counsel also stated that $77 was later refunded to Mrs. Hall. *Id.*, at 57. We are not advised how the latter amount was computed.

[11] A corporate surety bond in the amount of $1,650 was duly filed.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed *per curiam*, 493 F. 2d 1211 (1974), relying upon its opinion and decision in *Rambo* v. *United States, supra*, decided one month earlier. In *Rambo* the court had held that the failure of the IRS to issue a deficiency notice for a terminated taxable period, and the consequent unavailability of a remedy in the United States Tax Court, entitled the taxpayer to injunctive relief. Because of the conflict, indicated above, we also granted certiorari in Mrs. Hall's case. 419 U. S. 824 (1974).

II

In these cases, the taxpayers seek the protection of certain procedural safeguards that the Government claims were not intended to apply to jeopardy terminations. Specifically, the taxpayers argue that the procedures mandated by § 6861 *et seq.* for assessing and collecting deficiencies whose collection is in jeopardy also govern assessments of taxes owing, but not reported, after the termination of a taxpayer's taxable period under § 6851. Resolution of this claim requires analysis of the interplay between these two basic jeopardy provisions—§ 6851, the jeopardy-termination provision, and § 6861, the jeopardy-assessment provision.

The initial workings of the jeopardy-termination provision, which essentially permits the shortening of a taxable year, are not in dispute. When the District Director determines that the conditions of § 6851 (a) are met—generally, that the taxpayer is preparing to do something that will endanger the collection of his taxes [12]—the District Director may declare the taxpayer's

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[12] The precise findings required are: (1) that the taxpayer designs quickly to depart from the United States or to remove his property therefrom; or (2) that he intends to conceal himself or his property therein; or (3) that he is about to do any other act tending to

current tax year terminated. The tax for the shortened period and any unpaid tax for the preceding year become due and payable immediately, § 6851 (a), and the taxpayer must file a return for the shortened year. § 443 (a)(3).

The disagreement between the taxpayers and the Government focuses on the applicability of the jeopardy-assessment procedures of § 6861 *et seq.* to the assessment [13] and collection of taxes that become due upon a § 6851 termination. Section 6861 (a) provides for the immediate assessment of a deficiency, as defined in § 6211 (a), whenever the assessment or collection of the deficiency would be "jeopardized by delay." By allowing an immediate assessment, § 6861 (a) provides an exception to the general rule barring an assessment until the taxpayer has been sent a notice of deficiency and has been afforded an opportunity to seek resolution of his tax liability in the Tax Court.[14] Certain procedural safeguards are provided, however, to the taxpayer whose deficiency is as-

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prejudice or render wholly or partly ineffectual proceedings to collect income tax for the current or preceding year. § 6851 (a). See n. 1, *supra*.

[13] The "assessment," essentially a bookkeeping notation, is made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls. 26 U. S. C. § 6203. In both of the cases at bar, the assessments were made immediately upon termination of the taxpayers' taxable years.

In the past, the Government has argued that § 6851 contained its own assessment authority, see *Schreck* v. *United States*, 301 F. Supp. 1265 (Md. 1969), but it has since abandoned that position, see *Lisner* v. *McCanless*, 356 F. Supp. 398, 401 (Ariz. 1973), and it does not press the point here. Cf. n. 17, *infra*.

[14] A tax deficiency whose collection is not in jeopardy is collected according to the procedures of §§ 6211–6216 of the Code, 26 U. S. C. §§ 6211–6216 (1970 ed. and Supp. IV). Under § 6213 (a), the taxpayer ordinarily has 90 days after mailing of his deficiency notice in which to file his claim with the Tax Court.

sessed immediately under § 6861 (a). Within 60 days after the jeopardy assessment, the District Director must send the taxpayer a notice of deficiency, § 6861 (b), which enables the taxpayer to file a petition with the Tax Court for a redetermination of the deficiency, 26 U. S. C. § 6213 (a) (1970 ed., Supp. IV). The taxpayer can stay the collection of the amount assessed by posting an equivalent bond, § 6863 (a). Any property seized for the collection of the tax cannot be sold until a notice of deficiency is issued and the taxpayer is afforded an opportunity to file a petition in the Tax Court. If the taxpayer does seek a redetermination of the deficiency in the Tax Court, the prohibition against sale extends until the Tax Court decision becomes final. § 6863 (b)(3)(A).[15]

The taxpayers view the provisions of § 6861 *et seq.* as complementary to those of § 6851. They contend that to the extent the tax owing upon a jeopardy termination has not been reported, it is a "deficiency" as that term is defined in § 6211 (a) and used in § 6861 (a), and that the deficiency, being of necessity one whose assessment or collection is in jeopardy,[16] must be assessed and collected in accordance with the procedures of § 6861 *et seq.*

Under the Government's view, on the other hand, §§ 6851 and 6861 are aimed at distinct problems and have no bearing on each other. "Section 6851," according to the Government, "advances the date when

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[15] The rule against sale of the taxpayer's property has three limited exceptions: the property can be sold (1) if the taxpayer consents to the sale; (2) if the expenses of maintenance of the property will greatly reduce the net proceeds of its sale; or (3) if the property is perishable. §§ 6863 (b)(3)(B), 6336.

[16] This follows because the findings necessary to terminate a taxable year under § 6851 will always justify a finding that the assessment of the taxes owed will be "jeopardized by delay." See nn. 1 and 2, *supra*.

taxes are due and payable, while Section 6861 advances the time for collection of taxes which are already overdue [*i. e.*, already owing for a prior, normally expiring taxable year]." Brief for United States 10. The validity of this distinction rests on the Government's claim that a deficiency can arise only with respect to a nonterminated taxable year, so that no deficiency can be created by a § 6851 termination. If there is no deficiency to assess, of course, the provisions of § 6861 *et seq.* cannot apply.

Thus, under the Government's reading of the Code, the procedures for assessment and collection of a tax owing, but not reported, after the termination of a taxable period are not governed by § 6861 *et seq.*[17] The Government argues that, with the single exception of the bond provision of § 6851 (e), the taxpayer's only remedy upon a jeopardy termination is to pay the tax, file for a refund, and, if the refund is refused, bring suit in the district

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[17] Since it does not view the termination as creating a deficiency, the Government would apply neither the ordinary nor the jeopardy deficiency assessment procedures. Under the Government's approach, the taxes due upon a jeopardy termination are simply assessed under the general assessment section of the Code, § 6201, 26 U. S. C. § 6201 (1970 ed. and Supp. IV).

The Government further argues that the *power* to assess jeopardy terminations is derived solely from the general assessment section. While the taxpayers argue that the power to assess jeopardy terminations comes from the jeopardy-assessment provision, § 6861, rather than the general assessment provision, § 6201, we need not resolve that question here. Even if the Government is correct that the assessment power comes from § 6201, the procedural rules of § 6861 *et seq.* govern, on their face, when the assessment is of a deficiency whose collection is in jeopardy. See n. 2, *supra*. Likewise, the procedural rules of §§ 6211–6216 govern assessments empowered by § 6201 when the assessment is of a deficiency whose collection is not in jeopardy. See n. 14, *supra*, and accompanying text. Cf. n. 13, *supra*.

court or the Court of Claims. See 28 U. S. C. § 1346 (a)(1). Since the IRS has up to six months to act on a request for a refund, the taxpayer, under the Government's theory, may have to wait up to half a year before gaining access to any judicial forum. See 26 U. S. C. §§ 6532 (a), 7422 (a) (1970 ed. and Supp. IV).

The Government does not seriously challenge the taxpayers' conclusion that if the termination of their taxable periods created a deficiency whose assessment or collection was in jeopardy, the assessments and collections in these cases should have been pursuant to the procedures of § 6861 *et seq.* The question, then, is whether the tax owing, but not reported, upon a jeopardy termination is a deficiency within the meaning of § 6211 (a).

III

In essence, a deficiency as defined in the Code is the amount of tax imposed less any amount that may have been reported by the taxpayer on his return.[18] § 6211

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[18] A deficiency is defined as follows:

"(a) In general.

"For purposes of this title in the case of income, estate and gift taxes and excise taxes, imposed by subtitles A and B, chapters 42 and 43, the term 'deficiency' means the amount by which the tax imposed by subtitle A or B or chapter 42 or 43, exceeds the excess of—

"(1) the sum of

"(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

"(B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

"(2) the amount of rebates, as defined in subsection (b)(2), made." 26 U. S. C. § 6211 (a) (1970 ed. and Supp. IV).

See also Treas. Reg. § 301.6211–1 (a), 26 CFR § 301.6211–1 (a) (1975). Thus a deficiency does not include all taxes owed by a

(a). Where there has been no tax return filed, the deficiency is the amount of tax due. Treas. Reg. § 301.6211–1 (a), 26 CFR § 301.6211–1 (a) (1975). As we have seen, upon terminating a taxpayer's taxable year under § 6851, the District Director makes a demand for the payment of the unpaid tax for the terminated period and for the preceding taxable year. The taxpayer is then required to file a return for the truncated taxable year. § 443 (a)(3). The amount due, of course, must be determined according to ordinary tax principles, as applied to the abbreviated reporting period. The amount properly assessed upon a § 6851 termination is thus the amount of tax imposed under the Code for the preceding year and the terminated short year, less any amount that may already have been paid. To the extent this sum has not been reported by the taxpayer on a return, it fits precisely the statutory definition of a deficiency.[19]

The Government resists this conclusion by reading the definition of "deficiency" restrictively to include only those taxes due at the end of a full taxable year when a return has been or should have been made. It argues that a "deficiency" cannot be determined before the close of a taxable year. Of course, we agree with the Govern-

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taxpayer, but only those that are both owed and not reported. Cf. n. 19, *infra*.

[19] To the extent the tax owing upon a jeopardy termination has been reported by the taxpayer—either because it was reported for the preceding year, or because the taxpayer immediately filed a § 443 return—no deficiency is created, even if the taxes reported have not yet been paid. See n. 18, *supra*. Of course, the procedures for assessing deficiencies whose collection is in jeopardy, § 6861 *et seq.*, would not apply to such monies. The taxpayer has conceded owing the taxes he has reported, and those taxes, if unpaid, may be directly obtained by levy without according any prepayment access to the Tax Court. The levy provision, § 6331, contains provisions for the expedited collection of taxes owing in jeopardy situations.

ment that a deficiency does not arise until the tax is actually due and the taxable year is complete. The fact is, however, that under § 6851 the tax is due immediately upon termination. Moreover, upon a § 6851 termination, the taxpayer's taxable year has come to a close. See *Sanzogno* v. *Commissioner*, 60 T. C. 321, 325 (1973).[20] Section 441 (b)(3) defines as a "taxable year" the terminated taxable period on which a return is due under § 443 (a)(3). See also § 7701 (a)(23). Under the statutory definition of § 6211 (a), the tax owing and unreported after a jeopardy termination, which in these cases and in most § 6851 terminations is the full tax due, is clearly a deficiency. We see nothing in the definition to suggest that a deficiency can arise only at the conclusion of a 12-month taxable year; it is sufficient that the taxable period in question has come to an end and the tax in question is due and unreported.[21]

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[20] The broad dictum to the contrary in the Board of Tax Appeals' 1938 opinion in *Ludwig Littauer & Co.* v. *Commissioner*, 37 B. T. A. 840, 842, upon which the Government in part relies, was apparently rejected by the Tax Court in the *Sanzogno* opinion. The majority recognized in *Sanzogno* that "[i]t is possible that our holding is in some conflict with the rationale of our opinion in *Ludwig Littauer & Co.*," 60 T. C., at 325 n. 2, and Judge Simpson wrote separately to suggest that the earlier precedent should have been given its formal burial then and there. In a subsequent § 6851 case, *Jones* v. *Commissioner*, 62 T. C. 1 (1974), the Tax Court avoided the broad rationale of *Littauer* and instead held simply that a termination letter was not a deficiency notice and that without a deficiency notice a taxpayer cannot litigate his claim in the Tax Court.

[21] See 9 J. Mertens, Law of Federal Income Taxation § 49.130 (J. Malone rev. 1971); Odell, Assessments: What are they—Ordinary? Immediate? Jeopardy?, 2 N. Y. U. 31st Inst. on Fed. Tax. 1495, 1520, 1522 (1973).

The Government argues that a deficiency cannot be created by a jeopardy termination because a notice of deficiency for a terminated year would make no sense. This is so, it is argued, because

Besides conflicting with the plain language of the Code provisions directly before us, the Government's position in these cases would, for no discernible purpose, isolate the taxpayer subjected to a jeopardy termination from most other income-tax payers. If the unreported tax due after a jeopardy termination is not a deficiency, the IRS need not issue the taxpayer a deficiency notice and accord him access to the Tax Court for a redetermination of his tax. Denial of an opportunity to litigate in the Tax Court is out of keeping with the thrust of the Code, which generally allows income-tax payers access to that court. Where exceptions are intended, the Code is explicit on the matter. See, *e. g.*, § 6871 (b). Denying a Tax Court forum to a particular class of taxpayers is sufficiently anomalous that an intention to do so should not be imputed to Congress when the statute does not expressly so provide. This is particularly so in view of the Government's concession that the jeopardy-assessment procedures of § 6861 *et seq.* are sufficient to protect its interests, and that providing taxpayers with the

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the year is not really over and may be reopened pursuant to § 6851 (b). Brief for United States 24–25. The Government ignores the effect of a § 6851 termination: for the taxpayer the "taxable year" is complete and taxes are immediately owing for that short year. §§ 441 (b)(3), 443 (a)(3), 6851. The deficiency for that period can easily be computed under § 6211 and notice of that deficiency issued. If the short year is thereafter reopened and again terminated, a new notice of deficiency can, and under our view of § 6861 *et seq.* must, be issued. § 6861 (b).

The Government's argument, Brief for United States 25–26, that Tax Court jurisdiction in the case of a terminated year that is subject to reopening is inappropriate must likewise fail. We see no reason why the Tax Court, applying normal tax principles, should be less capable of determining the tax owing for the short year than the district court or Court of Claims, which, under the Government's theory, would make that determination. See also § 6861 (c).

limited protections of those procedures would not impair the collection of the revenues.[22]

IV

While the plain language of the provisions at issue here and their place in the legislative scheme suggest that the unreported tax due upon a § 6851 termination is a deficiency and that the deficiency, its collection being in jeopardy, must be assessed and collected according to the procedures of § 6861 *et seq.*, the Government attempts to undercut this conclusion by pointing to the legislative history of the several provisions at issue in this case. We are unpersuaded. The jeopardy-assessment and jeopardy-termination provisions have long been treated in a closely parallel fashion, and nothing that the Government points to in the early codifications suggests the contrary.

As the Government points out, the Revenue Act of 1918 (1918 Act) contained a termination provision, § 250 (g), 40 Stat. 1084, that was very similar to the present § 6851. Under the 1918 statute all assessments were made under the authority of Rev. Stat. § 3182,[23] and the taxpayer could attack an assessment only by paying the amount claimed and bringing suit for a refund in district court. Since there was no way for the taxpayer to contest assessments prior to payment, the Government had no need for any expedited jeopardy-assessment procedure

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[22] The Government repeatedly conceded at oral argument that adoption of the taxpayers' theory would result in no significant injury to the Government other than the loss of some of the cases now pending in the lower courts. Tr. of Oral Arg. 9–10, 18, 21, 23, 24, 28, 30. This concession completely rebuts the dissent's claim that our decision today deprives the IRS "of a device it obviously needs in combatting questionable tax practices . . . ." *Post*, at 189.

[23] That statute was almost identical to § 6201 of the present Code.

such as is now authorized in § 6861.[24] When a termination was made under § 250 (g), the tax assessment and collection thus proceeded exactly as in any other case—the taxpayer had to pay first and litigate later.

In the Revenue Act of 1921 (1921 Act), 42 Stat. 227, Congress added both a special procedure for prepayment challenges to assessments and an exception to that procedure. The special procedure made available, under certain circumstances, a limited administrative remedy within the Bureau of Internal Revenue (predecessor to the IRS) by which taxpayers could question assessments before paying the taxes assessed. § 250 (d) of the 1921 Act, 42 Stat. 266. The Commissioner could, however,

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[24] The jeopardy-assessment procedure, as is indicated, *supra*, at 170, is an exception to the normal deficiency-assessment mechanism, which allows a taxpayer the prepayment remedy of withholding the taxes claimed by the Government until after a final judicial determination of liability. Of course, under the 1918 Act a taxpayer who sought to place in jeopardy collection of his taxes could be forestalled under the jeopardy-termination provision of § 250 (g), which enabled the IRS to declare immediately owing the tax for the present or previous taxable year. That the jeopardy-assessment procedures, born of necessity to reconcile the prepayment remedy with the occasional need for expedited collections of taxes, did not exist to govern assessments after jeopardy terminations under the 1918 Act does not mean, of course, that the procedures, once formulated, were not intended to cover assessments of deficiencies created by jeopardy terminations as well as all other jeopardy assessments.

The Government suggests that the *power* to assess jeopardy terminations cannot derive from the jeopardy-assessment section because the jeopardy-termination provision existed in the 1918 Act before any provision was made for jeopardy assessments. Brief for United States 40–42. Since in our view the source of the power to assess jeopardy terminations is irrelevant in determining whether the procedures for jeopardy assessments apply to assessments after jeopardy terminations, see n. 17, *supra*, this argument is of no consequence.

pretermit that procedure if he believed that collection of the revenues might be jeopardized by delay. This exception, contained in a proviso to § 250 (d), was the precursor of § 6861. Since the proviso limited the availability of the administrative remedy to cases where collection of the taxes due would not be "jeopardized by such delay," the remedy was necessarily inapplicable to cases in which a § 250 (g) termination was made. As of 1921, then, the nascent prepayment remedy was available to ordinary taxpayers but not to taxpayers in either jeopardy situation—where the tax year had been terminated pursuant to § 250 (g), or where the full tax year had run and the Commissioner had determined that the collection of the tax would be jeopardized under the proviso to § 250 (d).

The Government, however, relies heavily on the 1921 Act, claiming that "[t]he key to an understanding of the term 'deficiency' lies" therein. Brief for United States 42. It relies on a reference to the term "deficiency" in § 250 (b), which set out the procedure for handling underpayments after returns had been filed:

> "If the amount already paid is less than that which should have been paid, the difference, to the extent not covered by any credits due to the taxpayer under section 252 (hereinafter called 'deficiency') . . . shall be paid upon notice and demand by the collector." 40 Stat. 265.

This "hereinafter" reference was permanently eliminated when the Act was revised in the Revenue Act of 1924 (1924 Act) and the word "deficiency" precisely defined—in much the same way as it is today. Nonetheless, the Government persists in viewing the reference in the 1921 Act as an authoritative definition of "deficiency." Since the reference related only to money owed after a return had been filed and examined, the Govern-

ment argues that Congress in 1921 did not consider the amount assessed pursuant to a jeopardy termination—which often must be assessed before a return is filed—to be a "deficiency." This supposed limitation in the 1921 Act continues, in the Government's view, to this day. We disagree with the Government's analysis.

To understand the use of the word "deficiency" in the 1921 Act, it is necessary to begin with the 1918 Act, where the term first appeared. In the 1918 statute the term was not formally defined but appeared in various provisions dealing with underpayments and overpayments of tax, referring to the difference between the amount due and the amount already paid. "Deficiency" was used synonymously with the word "understatement," and it is clear from the context that neither word was being used as a term of art. In the 1921 Act, the 1918 language was left largely unchanged, except that after the reference to the difference between the amount paid and the amount due, Congress added the parenthetical expression "(hereinafter called 'deficiency')," and from that point on replaced all references to "understatement" with the word "deficiency." From the context, it is evident that the "hereinafter" parenthetical term was not intended as a restrictive definition of deficiency, but merely as an indication that throughout the subsection the word would be used as shorthand for the difference between the amount paid and the amount that should have been paid.[25] We thus find nothing in the informal use of the term "deficiency" in the 1921 Act to limit our construc-

[25] Examination of the entire text of § 250, including the termination provision, § 250 (g), strongly suggests that in the 1921 Act the word "deficiency" was used in its colloquial sense to mean the amount of tax remaining unpaid at the time the tax was due, and that no significance was attached to whether a return had been filed at that time.

tion of the precise definition in § 6211 (a) of the present Code.

In 1924 Congress made a number of important changes in the jeopardy-assessment scheme. The termination section, § 282, 43 Stat. 302, remained basically the same as it had been in § 250 (g) of the 1921 Act, but taxpayers' prepayment remedies in the jeopardy-assessment provision were substantially altered. Section 274 (a) of the 1924 Act, 43 Stat. 297, provided that if, "in the case of any taxpayer, the Commissioner determine[d] that there is a deficiency" in the tax imposed by the Act, the Commissioner was required to mail a notice of deficiency to the taxpayer. Within 60 days of mailing of the notice, and prior to payment of the deficiency, the taxpayer was entitled to file an appeal with the Board of Tax Appeals, an agency independent of the Bureau of Internal Revenue. The only exception to this statutory provision permitting general access to the Board of Tax Appeals was that for a jeopardy assessment. The jeopardy-assessment provision, § 274 (d), permitted the Commissioner to assess and collect a deficiency immediately, bypassing various procedures set out in § 274 (a) for the ordinary assessment and collection of deficiencies. Even in the jeopardy-assessment situation, however, the taxpayer could gain access to the Board of Tax Appeals by posting a bond. § 279 (a).

Section 273 of the 1924 Act defined "deficiency," much as it is now defined, as the amount by which the tax due exceeds the tax shown on the taxpayer's return, or, "if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency." § 273 (2). In cases in which no return was filed and no amount had previously been assessed or collected, § 273 (2) in effect defined a "deficiency" simply as the amount

of tax due. Since § 282—the termination provision—provided that at the time of termination the Commissioner would demand "immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of such tax as is unpaid . . . ," and that the tax demanded would become "immediately due and payable," the tax "due and payable" at the time of the termination notice, to the extent unreported, would appear to fit the definition of "deficiency" in § 273 (2). This being so, the Government's assertion that under the 1924 Act, § 282 terminations were not subject to the procedures of § 274 (d) is incorrect, and much of the force of its argument from the history of the statute is lost.

With the amendments made by the Revenue Act of 1926, c. 27, 44 Stat. 9, the statutory provisions relevant to these cases took essentially their present form. The jurisdiction of the Board of Tax Appeals (subsequently renamed the Tax Court) was broadened, in part by granting taxpayers subjected to jeopardy assessments a means of having their assessment redetermined by the Board without having to post bond as had previously been required. Under the new jeopardy-assessment procedures, the Commissioner could immediately assess the deficiency, but in addition to a demand for payment, he was required to send a notice of deficiency, § 279 (b), which allowed the jeopardy taxpayer immediate access to the Board of Tax Appeals. § 274 (a). As in the 1924 Act, there was no indication that taxpayers subjected to a jeopardy termination would not then be assessed under the jeopardy-assessment procedures to the extent a deficiency was owing, and thereby allowed to follow the same route to the Board of Tax Appeals that was available to other jeopardy taxpayers.

In sum, to the extent that it sheds any light on the question at all, the legislative history seems to help the taxpayers rather than the Government. In the course of the development of a prepayment remedy and a jeopardy exception to that remedy between 1918 and 1926, taxpayers subjected to jeopardy terminations and those subjected to jeopardy assessments for nonterminated taxable years were consistently treated alike. In 1921, when the administrative remedy was first created, neither those subjected to a jeopardy assessment for a nonterminated year nor those subjected to a termination could avail themselves of that remedy. In 1924, those terminated and those subjected to jeopardy assessments for nonterminated years were similarly denied access to the Board of Tax Appeals, unless they filed a bond in the amount of the claim. And in 1926, when the scheme assumed its current form, there was no indication that Congress intended for the first time to treat the two groups separately by granting direct access to the Board of Tax Appeals to those subjected to a jeopardy assessment for a nonterminated year, but denying it to those subjected to an assessment following a jeopardy termination.

V

Based on the plain language of the statutory provisions, their place in the legislative scheme, and the legislative history, we agree with the taxpayers' reading of the pertinent sections of the Code.[26] Under that reading, the

[26] As a final reason for adopting their construction of the Code, the taxpayers argue that the Government's reading would violate the Due Process Clause of the Fifth Amendment. The basis for this claim is that under the assessment procedures of § 6861 *et seq.* the taxpayer is guaranteed access to the Tax Court within 60 days, while under the procedures suggested by the Government the taxpayer in a termination case could be denied access to a judicial forum for up to six months. See *supra,* at 173. Cf. *Phillips* v.

tax owing, but not reported, at the time of a § 6851 termination is a deficiency whose assessment and collection are subject to the procedures of § 6861 *et seq.* Section 6861 (b) requires a notice of deficiency to be mailed to a taxpayer within 60 days after the jeopardy assessment. Section 6863 bars the offering for sale of property seized until the taxpayer has had an opportunity to litigate in the Tax Court. Because the District Director failed to comply with these requirements in these cases, the taxpayers' suits were not barred by the Anti-Injunction Act,[27] § 7421 (a) of the Code. The judgment of the

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Commissioner, 283 U. S. 589 (1931). Moreover, the taxpayers argue, under the procedures of § 6861 *et seq.* the property seized may not be sold until after a final determination by the Tax Court, § 6863, while under the Government's theory the property seized in a jeopardy termination may be immediately subject to sale. Because we agree with the taxpayers' construction of the Code, we need not decide whether the procedures available under the Government's theory would, in fact, violate the Constitution.

The taxpayers do not question here, and we do not consider whether, even if the jeopardy-assessment procedures of § 6861 *et seq.* are followed, due process demands that the taxpayer in a jeopardy-assessment situation be afforded a prompt post-assessment hearing at which the Government must make some preliminary showing in support of the assessment. See *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* 419 U. S. 601, 607 (1975); *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 610–611 (1974); *Fuentes* v. *Shevin,* 407 U. S. 67, 72 (1972).

[27] The Anti-Injunction Act generally bars suits to enjoin the assessment or collection of taxes. But § 7421 (a) is subject to several exceptions, one pertinent here: it does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination. § 6213 (a). On the other hand, this exception to the Anti-Injunction Act does not apply to jeopardy assessments made "as . . . provided in" § 6861. Thus jeopardy assessments ordinarily may not be enjoined. When, however, the IRS fails to follow the procedures of

United States Court of Appeals for the Sixth Circuit in No. 74–75 is affirmed. The judgment of the United States Court of Appeals for the Second Circuit in No. 73–1808 is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of these cases.

MR. JUSTICE BRENNAN, concurring.

I join the Court's opinion, and the statutory construction that makes unnecessary the Court's addressing the claims of Mr. Laing and Mrs. Hall that they were denied

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§ 6861 *et seq.*, as in these cases, it is not assessing "as . . . provided in" § 6861, and the § 6861 exception to § 6213 (a) is inapplicable. In such cases, § 6213 (a)'s exception to the Anti-Injunction Act becomes operative, and a suit to enjoin the collection of the jeopardy deficiency may be brought.

In No. 73–1808, petitioner Laing brought suit approximately three weeks after the jeopardy termination and assessment. Since the IRS has up to 60 days after a jeopardy assessment to mail the notice of deficiency, § 6861 (b), no action had yet been taken that was not in conformity with the jeopardy-assessment procedures, and the suit could properly have been dismissed at that time as barred by the Anti-Injunction Act. When 60 days passed without the mailing of a notice of deficiency, however, petitioner amended his complaint to include this violation of the procedures of § 6861. App. in No. 73–1808, p. 19. At that time the IRS was violating the required procedures, the Anti-Injunction Act bar was no longer applicable, and the District Court had jurisdiction to determine petitioner's claim. Accordingly, its dismissal of Laing's action was improper.

Respondent Hall in No. 74–75 likewise brought suit before the 60-day grace period had expired (although the 60-day period subsequently lapsed without the issuance of the required notice of deficiency). Mrs. Hall alleged, however, that the IRS was offering her automobile for sale before issuing her a notice of deficiency and

procedural due process secured by the Fifth Amendment. Decision of that question is therefore expressly reserved, *ante*, at 184 n. 26. I write only to state my views of the considerations raised by the due process claim.

The Court's construction of the relevant statutes permits the IRS to seize a taxpayer's assets upon a finding by the Commissioner in compliance with § 6851 (a)(1). No hearing is required, judicial or administrative, prior to the seizure. But it cannot be gainsaid that the risk of erroneous determinations by the Commissioner with consequent possibility of irreparable injury to a taxpayer is very real. This suffices to bring due process requirements into play.

The "root requirement" of the Due Process Clause is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U. S. 371, 379 (1971) (emphasis in original). See, *e. g.*, *Bell* v. *Burson*, 402 U. S. 535, 542 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). The precise timing and attributes of the due process requirement, however, depend upon accommodating the competing interests involved. *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975); *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972); *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

Governmental seizures without a prior hearing have been sustained where (1) the seizure is necessary to protect an important governmental or public interest, (2) there is a "special need for very prompt action," and

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affording her the opportunity to litigate in the Tax Court, an action that violated § 6863. Since the offering for sale was not in conformity with the jeopardy-assessment procedures of § 6861 *et seq.*, the Anti-Injunction Act bar was inapplicable, and the levy and subsequent sale could properly be enjoined under § 6213 (a).

(3) "the standards of a narrowly drawn statute" require that an official determine that the particular seizure is both necessary and justified. See *Fuentes* v. *Shevin*, 407 U. S. 67, 91 (1972). Seizures pursuant to jeopardy assessments are clearly necessary to protect important governmental interests and there is a "special need for very prompt action." But § 6851 (a)(1), although requiring an official determination that the particular seizure is both necessary and justified, nevertheless falls short, in my view, of meeting due process requirements. This is because present law denies an affected taxpayer access to any forum for review of jeopardy assessments for up to 60 days.

In *Goss* v. *Lopez*, *supra*, the Court held that notice and hearing must follow a deprivation "as soon as practicable." 419 U. S., at 582–583. The Louisiana statute upheld in *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600 (1974), entitled debtors whose assets had been seized to a hearing immediately following seizure and to invalidation of the seizure unless the creditor could prove the basis for the seizure, *id.*, at 606. In contrast, a Georgia garnishment statute was invalidated for want of any opportunity "for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601, 607 (1975). Thus, the governing due process principle obliges the IRS to provide a prompt hearing at which the IRS must prove "at least probable cause" for its claim.

But present law requires that taxpayers wait up to 60 days before challenging jeopardy assessments by filing suit in the Tax Court. However expeditiously the Tax Court handles the claim, that court is not required to decide the merits within any specified time, and no provision is made for a prompt preliminary evaluation of

the basis for the assessment. In my view, such delay would be constitutionally permissible only if there were some overriding governmental interest at stake, and the IRS suggested none in either of these cases.* But even if delay in judicial review on the merits were justifiable, due process would at least require some supporting rationale for denying taxpayers the opportunity for a prompt preliminary determination by an unbiased tribunal on the validity of the basis for the assessment. Again, none was offered in either of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, dissenting.

Every experienced tax practitioner is aware of the problems of tax collection and tax evasion, and of the frequent need for prompt action on the part of those having responsibility for the protection of the revenues. Every experienced tax practitioner also knows that our Internal Revenue Code is a structured and complicated instrument—perhaps too complex—that deserves careful and historical analysis when, as here, longstanding provisions of that Code are challenged.

The Court in these two cases today gives every evidence of pursuing a quest for what it seems to regard as a desirable or necessary symmetry and, in my view, and

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*The dissenting opinion would require no justification for even a six-month delay, apparently on the view that tax seizures are somehow different from other deprivations for due process purposes. I am aware of no precedent drawing that distinction. *Phillips* v. *Commissioner*, 283 U. S. 589 (1931), concerned a procedure that offered taxpayers an alternative of seeking a prompt determination before the Board of Tax Appeals, the predecessor to the Tax Court, before payment and without posting any bond. *Id.*, at 598. The bond referred to in the dissenting opinion, *post*, at 210–211, was required pending review in the court of appeals of the Board of Tax Appeals' decision.

most unfortunately, indulges in a faulty analysis of the Code's structure and misinterprets the historical development of the statutes. It is led astray, I fear, by the emotional appeal of the facts in Mrs. Hall's case, involving, as it does, her husband's arrest on drug-related charges [1] and the seizure by the Internal Revenue Service of Mrs. Hall's Volkswagen automobile. I have little doubt that if Mr. Laing's case had come here alone and unfettered by the coincidental appearance of Mrs. Hall's case, the Court would have denied certiorari to Mr. Laing out of hand or, if not, would readily have affirmed. But Mr. Laing's case did not arrive alone. Thus the "equities" and the extremes of Mrs. Hall's case, with their sad overtones, tend to counterbalance, and now have overbalanced, the lack of "equity" in Mr. Laing's case. The result is that the Internal Revenue Service is deprived of a weapon it has long possessed under the Code and of a device it obviously needs in combatting questionable tax practices and tax evasion by those who do not pay their rightful taxes and who thereby increase the burden of those who do.

It is unfortunate, of course, that the issues are imbedded in a complicated and detailed tax code. Correct analysis, I submit, demands conclusions opposite to those reached by the Court today. I therefore dissent.

I

For an understanding of the purport and reach of § 6851 (a)(1), an examination of the statutory structure of which it is a part is indicated.

A. The customary deficiency procedure.—This is prescribed by Subchapter B of Chapter 63 of the Code under the heading "Assessment." The term "deficiency" is defined in § 6211 (a), 26 U. S. C. § 6211 (a),

[1] Mr. Hall evidently was convicted. Tr. of Oral Arg. 45.

(1970 ed. and Supp. IV), essentially as the excess of the tax imposed by the Code over the amount of tax shown on the taxpayer's return as filed. If, however, the taxpayer files no return, or shows no tax on the return he does file, the deficiency is the amount of the tax imposed by the Code. Treas. Reg. § 301.6211–1 (a), 26 CFR § 301.6211–1 (a) (1975).

Once the Commissioner determines that a deficiency exists, he "is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." 26 U. S. C. § 6212 (a) (1970 ed., Supp. IV). Under § 6213 (a) (1970 ed., Supp. IV), the taxpayer, within 90 days after the mailing of that notice, may file a petition with the United States Tax Court for a redetermination of the deficiency. During this period—and, if a petition is filed with the Tax Court, until that court's decision has become final—the Commissioner, with one exception hereinafter noted, is precluded from assessing the deficiency, from making a levy, and from proceeding in court for its collection. Any such move on the part of the Internal Revenue Service during that time "may be enjoined by a proceeding in the proper court." Section 6213 (a) expressly makes the Anti-Injunction Act, § 7421 (a), inapplicable under those circumstances.

The sole exception to this preclusion of the Service during the customary deficiency procedure is also set forth explicitly in § 6213 (a). It is that the preclusion is not effective with respect to a jeopardy assessment under § 6861. No like exception, or reference, however, is made with respect to § 6851, the statute that empowers the Commissioner to terminate the taxpayer's taxable period when collection of the tax may be in jeopardy.

B. The termination-of-the-taxable-period statute.— This is the above-mentioned, and critical, § 6851, subsection (a)(1) of which is set forth in n. 1 of the Court's

opinion, *ante*, at 163. The statute constitutes the entire Part I of Subchapter A (Jeopardy) of Chapter 70 of the Code.

Our income tax system is primarily a self-reporting and self-assessment one. It is "based upon voluntary assessment and payment, not upon distraint." *Flora* v. *United States*, 362 U. S. 145, 176 (1960). See *Helvering* v. *Mitchell*, 303 U. S. 391, 399 (1938); Treas. Reg. § 601.103 (a), 26 CFR § 601.103 (a) (1975). Congress, nonetheless, early recognized that there would be instances where the Service must take immediate affirmative action in order to safeguard the collection of a tax.[2] Section 6851 (a)(1) fulfills this congressional concern and permits the District Director, see Treas. Reg. § 1.6851–1 (a), 26 CFR § 1.6851–1 (a) (1975), to terminate the taxable period if he finds that the taxpayer designs an act tending to prejudice or render ineffectual the collection of income tax for the current or the preceding tax year.[3] When this is done, notice of the termination must be given the taxpayer together with a demand for immediate payment of the tax for the taxable period so terminated. The tax thereupon becomes immediately due and payable.[4]

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[2] See n. 10, *infra*.

[3] The reference in the statute to the "preceding taxable year" enables the Commissioner to exercise the termination power after the close of the preceding year but prior to the filing of the return for that year. See, *e. g.*, *Irving* v. *Gray*, 479 F. 2d 20, 25 (CA2 1973); *United States* v. *Johansson*, 62–1 U. S. T. C. 83197 (SD Fla. 1961), aff'd in part and remanded, 336 F. 2d 809 (CA5 1964).

[4] A return for a taxable *period* terminated under § 6851 (a), and called for by § 443 (a)(3), is to be distinguished, despite the confusing use of the term "taxable year" in § 443 (a)(3), from a return for what is a true and self-constituted short period of the kind to which §§ 443 (a)(1) and (2) relate, that is, the interim period occasioned by a change in the taxpayer's annual accounting period,

Section 6851, standing alone, however, is not sufficient for a collection procedure because it does not contain its own assessment authority. The statute provides simply for the termination of the taxable period prematurely, and the authority must be found elsewhere in the statutory scheme.[5]

That assessment authority is granted by § 6201 (a) of the Code, 26 U. S. C. § 6201 (a).[6] This empowers the Commissioner "to make . . . assessments of all taxes . . . imposed by this title." An assessment is made by recording the liability of the taxpayer in the Service's books of account. § 6203. If, after demand, the taxpayer fails to pay, the Commissioner may invoke § 6321, which provides that the amount shall be a lien in favor of the United States upon the property of the taxpayer. The Service has power, after 10 days' notice and demand in a nonjeopardy situation, to collect the tax by levy and distraint. § 6331 (1970 ed. and Supp. IV).

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or when the taxpayer is in existence during only part of the entire taxable year.

[5] The Government, on at least one occasion in the past, has contended that § 6851 did contain its own assessment authority. See *Schreck* v. *United States*, 301 F. Supp. 1265, 1276 (Md. 1969). In the present cases, however, the Government states that the statute does not go so far. Brief for United States 20.

[6] Section 6201 (a) reads in pertinent part:

"The Secretary or his delegate is authorized and required to make the inquiries, determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law."

Respondent Hall suggests that § 6201 (a) by its terms is confined to taxes paid by stamp. I read the statute otherwise, for I regard the reference to payment effected "by stamp" as exclusive, rather than restrictive, of the assessment power.

Section 6851 (b) permits the Service to reopen the terminated taxable period each time the taxpayer is found to have received income within the current taxable year but since the termination. Similarly, the taxpayer himself may reopen the terminated period if he files "a true and accurate return." Under § 6851 (e), the taxpayer may avoid early collection by furnishing a bond to insure the timely making of a return and the payment of the tax.

Nowhere in these several subsections of § 6851 does the word "deficiency" appear. The section contains no words of authorization or requirement that the Commissioner issue a notice of deficiency. Seemingly, once the tax is made immediately due by termination of the taxable period, the Commissioner may exercise his general assessment authority and proceed forthwith to collect through lien, levy, and distraint.

C. The jeopardy-assessment statute.—This, so far as income, estate, and gift taxes are concerned, all of which require returns, is § 6861 of the Code, 26 U. S. C. § 6861.[7] It and the three succeeding sections constitute Part II (Jeopardy Assessments) of Subchapter A (Jeopardy) of Chapter 70 of the Code. Section 6861, like § 6851 (a), is designed to achieve collection under exigent circumstances.

Section 6861 is invoked only *after* the date upon which the tax for the full year is due. This stands in contrast

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[7] Section 6861 (a) reads:

"If the Secretary or his delegate believes that the assessment or collection of a deficiency, as defined in section 6211, will be jeopardized by delay, he shall, notwithstanding the provisions of section 6213 (a), immediately assess such deficiency (together with all interest, additional amounts, and additions to the tax provided for by law), and notice and demand shall be made by the Secretary or his delegate for the payment thereof."

to § 6851 (a), which permits premature termination of the taxable period. In other words, § 6851 (a) serves to advance the time when a tax becomes due and payable, whereas § 6861 serves to advance the time for collection of a tax already due. Jeopardy to collection lies in the background of both situations and triggers the invocation of either statute.

In sharp contrast with § 6851 (a), § 6861 (a) refers specifically to a "deficiency," as that term is defined in § 6211. The further reference in § 6861 (a) to § 6213 (a) is of significance. Section 6213 (a), as has been noted, provides for the filing by the taxpayer with the Tax Court of a petition for redetermination of the deficiency. By its reference to § 6213 (a), § 6861 (a) thus authorizes a jeopardy assessment, despite the available path for the taxpayer to the Tax Court and despite the presence of the otherwise operative preclusion provisions of § 6213 (a). Also, it confirms that a jeopardy assessment made under § 6861 (a) is reviewable in the Tax Court. That this is so is convincingly demonstrated by the additional fact that § 6861 (b) provides that if a jeopardy assessment is made before the mailing of any notice of deficiency, the Commissioner shall mail a notice within 60 days after the making of the assessment. Thus, although the Service in such a jeopardy situation is not restrained from immediate levy and collection, the taxpayer is nevertheless assured his relatively prompt access to the Tax Court for redetermination of the deficiency. In addition, under § 6863 (a), 26 U. S. C. § 6863 (a), the taxpayer may post a proper bond and thereby stay collection. And, absent specified exigent circumstances, sale of property seized for collection is not to be effected during the period of Tax Court review. § 6863 (b)(3).

D. The Federal Anti-Injunction Act.—This statute,

§ 7421 (a), generally prohibits suits to restrain assessment or collection of tax. It reads:

> "Except as provided in sections 6212 (a) and (c), 6213 (a), and 7426 (a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

The statute had its origin over a century ago in § 10 of the Revenue Act of Mar. 2, 1867, 14 Stat. 475.[8] See Rev. Stat. § 3224. It was enacted to prevent in the federal system the type of injunctive suits that had plagued tax collections by the States. The Court has recognized the congressional concern underlying the statute, namely, that if courts were to exercise injunctive power with respect to the collection of taxes, the Government's very existence could be threatened. See *Cheatham* v. *United States*, 92 U. S. 85, 89 (1876); *State Railroad Tax Cases*, 92 U. S. 575, 613 (1876); *Snyder* v. *Marks*, 109 U. S. 189, 193–194 (1883); *Bob Jones University* v. *Simon*, 416 U. S. 725, 736–737 (1974). The statute has been uniformly applied to bar suits before collection except in certain specific and delimited circumstances.

The first exception to the statute's bar is spelled out in the initial words of § 7421 (a) itself: the Act does not preclude injunctive suits within the contemplation of §§ 6212 (a) and (c) and 6213 (a). These sections, as has been seen, concern situations where a notice of deficiency is required and where jurisdiction of the United States Tax Court is thereby afforded.

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[8] "That section nineteen [of the Act of July 13, 1866, 14 Stat. 152] is hereby amended by adding the following thereto: 'And no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.'"

The second exception is also spelled out in the prefatory words of § 7421 (a): the Act does not apply to an injunctive suit within the contemplation of §§ 7426 (a) and (b)(1), 26 U. S. C. §§ 7426 (a) and (b)(1). These sections, however, concern a civil action instituted by a person other than the taxpayer, such as a person claiming a prior lien, and have no possible application here. See *Bob Jones University* v. *Simon*, 416 U. S., at 731–732, n. 6.

The third exception is of judicial origin. The Court, in *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, 7 (1962), observed that "if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the Act is inapplicable and . . . the attempted collection may be enjoined if equity jurisdiction otherwise exists." This obviously is a very narrow exception and is subject to a twofold test: a clear indication that the Government cannot prevail, and the presence of an equity consideration in the sense of threat of irreparable injury for which there is no adequate legal remedy. The Court recently reaffirmed the *Williams Packing* exception in *Bob Jones University* v. *Simon*, *supra*, and in *Commissioner* v. *"Americans United" Inc.*, 416 U. S. 752 (1974). It noted that a somewhat different attitude had been evident in the 1930's. See *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498 (1932), and *Allen* v. *Regents of the University System of Georgia*, 304 U. S. 439 (1938).

There is no question, of course, that the present suits instituted by petitioner Laing and respondent Hall are actions to restrain the collection or enforcement of tax, within the meaning of § 7421 (a). These parties, however, do not contend that the *Williams Packing* exception is applicable to their respective cases. I necessarily agree that the exception affords Mr. Laing and

Mrs. Hall no avenue of relief, for there is no indication in the records that on the merits the Government under no circumstances could prevail.[9]

II

This review of the statutory structure clearly reveals the following:

1. The congressionally intended normal procedure is to allow the taxpayer, if he desires it, some "breathing space" prior to exaction of the additional tax that is claimed. The avenue provided to accomplish this result is the route to the Tax Court where the issues, factual and legal, may be resolved prior to collection. This avoids the necessity of the taxpayer's disgorgement of funds, to his current financial detriment, even though he might ultimately prevail and recoup by refund all or a substantial part of the amount he pays. The choices the taxpayer makes, and the risks he assumes, by this route, include the forgoing of trial of the factual issues by a jury, having his trial before a specialist judge not assigned to the taxpayer's local district, and the accruing of interest on any deficiency ultimately redetermined, § 6601 (a), 26 U. S. C. § 6601 (a) (1970 ed., Supp. IV). If he selects the other route, that is, payment of the asserted deficiency, filing claim for refund, and suit, the taxpayer (if he chooses the district court rather than the Court of Claims) has his case tried before a United States district judge of his own district, with a jury available,

[9] I do not foreclose the possibility that in some case the Service's action in terminating a taxable period would come within the *Williams Packing* exception if the termination were so fictitious and without foundation that under no circumstances could the Government prevail on the merits. This view was taken by the Fifth Circuit in *Willits* v. *Richardson*, 497 F. 2d 240 (1974). See generally Note, Use of I. R. C. Section 6851: Exaction in the Guise of a Tax?, 6 Loyola U. L. J. 139, 151–158 (1975).

and it is the Government, not the taxpayer, that bears the burden of accruing interest, § 6611, 26 U. S. C. § 6611 (1970 ed., Supp. IV).

2. Despite this available avenue of litigation in the Tax Court before payment, and its use by the taxpayer after a notice of deficiency is issued, the Commissioner nonetheless may assess and collect, subject to the taxpayer's fulfillment of prescribed conditions, in a jeopardy situation. § 6861. This enables the Government to protect the revenues, but at the same time the path to the Tax Court is preserved for the taxpayer.

3. Jeopardy collection power is also vested in the Commissioner during the taxpayer's taxable period before his tax for the year can be determined. § 6851 (a). This, too, protects the revenues.

4. Both § 6861 and § 6851 are directed to critical and exigent circumstances. In this respect, neither statute is a part of the normal assessment and collection process. The one, § 6861, the "ordinary" jeopardy-assessment provision, operates *within* that usual procedure and while it is underway. The other, § 6851, however, operates separate and apart from that procedure and, indeed, inasmuch as the taxable year is not at an end, or a return for it is not yet overdue, before that procedure can get underway at all.

5. It would seem to follow, then, that §§ 6861 and 6851, although they are similar in character and although both are directed at emergency situations, are separate and distinct. Of the two, § 6851 is the more extreme and perilous, for its impact comes in midstream, that is, during the taxable year rather than after its close and a return for it has been filed. See *Ludwig Littauer & Co.* v. *Commissioner*, 37 B. T. A. 840, 842 (1938) (reviewed by the Board).

6. Because § 6851 is concerned with the situation prior to the overdue date for the filing of the year's return, that

is, with premature termination of a taxable period, at a time when the computation of the tax for the full year cannot be made or not yet has been made, it is clear that no deficiency as such can be ascertained, that no notice of deficiency can be issued, and that none is required. These terms and concepts have no sensible application and relationship to the § 6851 procedure.

III

The foregoing analysis and conclusion that a notice of deficiency is not required when a taxable period is prematurely terminated under § 6851, despite the Court's disavowal, is confirmed by the legislative history. This history demonstrates that §§ 6851 and 6861, although now consecutively placed in the present Code, are discrete and independent provisions, with the consequences that assessment authority for a termination under § 6851 does not derive from § 6861, as the taxpayers here assert and the Court is now led to believe, and that assessment following termination of a taxable period was not intended to be subject to review by the Tax Court.

As is often the case in tax matters, the successive Revenue Acts primarily present the pertinent legislative history.

The provision allowing premature termination of a taxable period where collection was feared jeopardized first appeared as § 250 (g) of the Revenue Act of 1918, 40 Stat. 1084.[10] The language of § 250 (g) ob-

[10] "If the Commissioner finds that a taxpayer designs quickly to depart from the United States or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect the tax for the taxable year then last past or the taxable year then current unless such proceedings be brought without delay, the Commissioner shall declare the taxable period for such taxpayer terminated at the end of the calendar month

viously comports substantially with the language of the current § 6851 (a). An assessment for a terminated period was made under the general assessment authority provided by Rev. Stat. § 3182. Judicial review at that time could be obtained only after payment of the tax and by way of a refund suit in the United States district court or in the Court of Claims. Rev. Stat. § 3226. See 28 U. S. C. § 1346 (a)(1).

Section 6861, on the other hand, evolved independently and initially with the Revenue Act of 1921. It was born as a proviso to § 250 (d) of that Act. 42 Stat. 266. Section 250 (d) established an administrative appeal procedure for resolution of taxpayer disputes; assessment of a deficiency could not be made pending final decision on the administrative appeal. This deferral, however, was not compelled where the Commissioner determined that collection was in jeopardy; when he so determined, assessment could be made immediately. Despite this introduction by the 1921 Act of the administrative appeal procedure, § 250 (g) of the 1918 Act, providing for termination of the taxable period, was continued as

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then last past and shall cause notice of such finding and declaration to be given the taxpayer, together with a demand for immediate payment of the tax for the taxable period so declared terminated and of the tax for the preceding taxable year or so much of said tax as is unpaid, whether or not the time otherwise allowed by law for filing return and paying the tax has expired; and such taxes shall thereupon become immediately due and payable. In any action or suit brought to enforce payment of taxes made due and payable by virtue of the provisions of this subdivision the finding of the Commissioner, made as herein provided, whether made after notice to the taxpayer or not, shall be for all purposes presumptive evidence of the taxpayer's design."

The presence of § 250 (g) so soon after the inception of the modern federal income tax in 1913, see the Sixteenth Amendment and the Tariff Act of Oct. 3, 1913, § II, 38 Stat. 166, discloses Congress' early and continuing concern with tax evasion.

§ 250 (g) of the 1921 Act, 42 Stat. 267, without any change material here and without reference to the newly established administrative appeal procedure. See S. Rep. No. 275, 67th Cong., 1st Sess., 20–21 (1921). And the assessment authority continued to be provided only by Rev. Stat. § 3182.

Congress soon recognized that taxpayers might not be convinced of the impartiality of an administrative appeal within the then Bureau of Internal Revenue. Accordingly, by § 900 of the Revenue Act of 1924, 43 Stat. 336, the Board of Tax Appeals was created as an independent agency in the Executive Branch. The taxpayer, prior to payment of his tax, could obtain a review in the Board whenever the Commissioner disagreed with the amount of tax reported. See H. R. Rep. No. 179, 68th Cong., 1st Sess., 7–8 (1924). The Board, however, was given only limited jurisdiction; it was confined to deficiencies in income, estate, and gift taxes and to claims for abatement of deficiencies. Revenue Act of 1924, §§ 900 (e), 274, 279, 308, 312, and 324, 43 Stat. 337, 297, 300, 308, 310, and 316. Review of the Commissioner's termination of a taxable period, however, was not cognizable before the Board. Under § 282 of the 1924 Act, 43 Stat. 302, the taxpayer whose taxable period was terminated could avoid immediate collection only by furnishing security that he would make a timely return and pay the tax when due.

The 1924 Act also introduced a more precise definition of the term "deficiency" to supplant the definition contained in the 1921 Act.[11] The new definition, contained in the 1924 Act's §§ 273 (1) and (2), 43 Stat. 296, is virtually identical to the present definition in § 6211 (a)

[11] Section 250 (b) of the Revenue Act of 1921, 42 Stat. 265, had defined "deficiency" as the difference between "the amount already paid" and "that which should have been paid."

of the 1954 Code and in Treas. Reg. § 301.6211–1, 26 CFR § 301.6211–1 (1975). The committee reports described this new definition in terms that indicate that a deficiency could not be determined until the time for filing the return had arrived, that is, until a date after the close of the taxable year. See H. R. Rep. No. 179, 68th Cong., 1st Sess., 24 (1924); S. Rep. No. 398, 68th Cong., 1st Sess., 30 (1924). There was nothing indicating that the Congress intended that the definition of "deficiency" was to encompass the amount declared due and payable upon the termination of a taxable period. The exception for the situation where collection after the close of the taxable year and after the passing of the due date for the filing of the return would be jeopardized by delay, however, was carried forward to the Board review created by the 1924 Act, and the Commissioner could immediately assess and collect notwithstanding the taxpayer's ability to go to the Board. Revenue Act of 1924, §§ 274 (d) and 279, 43 Stat. 297 and 300.

The Revenue Act of 1926, 44 Stat. 9, filled some interstices of Board jurisdiction. Direct appeal of Board decisions to the then circuit courts of appeals was provided. § 1001 (a), 44 Stat. 109. The Board was given jurisdiction to determine that the taxpayer had overpaid his tax as well as to determine that a deficiency existed. The definition of "deficiency" remained the same. § 273, 44 Stat. 55. Thus, the taxpayer whose taxable period was prematurely terminated still could not go to the Board.

The Revenue Acts following the 1926 Act, until and including the Internal Revenue Code of 1939, 53 Stat. pt. 1, effected no significant change in the termination or jeopardy-assessment provisions or in the jurisdiction of the Board of Tax Appeals.

The 1954 Code culminated the legislative development of §§ 6861 and 6851 and provided the current section

designations. Two minor changes were made in the statutes that are pertinent here, but neither altered the jurisdictional framework of the Tax Court which, by § 504 of the Revenue Act of 1942, 56 Stat. 957, had supplanted the Board of Tax Appeals. The first was the amendment of the termination statute, § 6851, by the addition of its present subsection (b). This permitted the reopening of the terminated taxable period either by the Commissioner or by the taxpayer. See Treas. Reg. §§ 1.6851–1 (b) and (c), 26 CFR §§ 1.6851–1 (b) and (c) (1975); H. R. Rep. No. 1337, 83d Cong., 2 Sess., A421 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 597 (1954). The second change was the addition of § 6863 (b)(3) to authorize a stay of the sale of property seized after a jeopardy assessment under § 6861 pending decision by the Tax Court. No similar stay was made explicitly available with respect to the termination provisions of § 6851.

This legislative history particularly reinforces two aspects of the conclusions, drawn above, upon analysis of only the language of the presently effective statutes:

The first is the inescapable fact that the assessment authority for an amount made "immediately due and payable" under § 6851 (a) is not § 6861 but is the general authority granted by § 6201. Indeed, during the time the Revenue Act of 1918 was in effect, that is, until the Revenue Act of 1921 was adopted, only § 6851's predecessor was in existence; the predecessor of § 6861 had not yet appeared. Thus, I disagree with the suggestions contained in *Clark* v. *Campbell*, 501 F. 2d 108, 121 (CA5 1974), in *Rambo* v. *United States*, 492 F. 2d 1060, 1064 (CA6 1974), and in *Schreck* v. *United States*, 301 F. Supp. 1265, 1273 (Md. 1969), that the placement of § 6861 in the Code immediately following § 6851 served to establish a *new* procedure mandatory for a proceeding under § 6851. That approach is expressly

foreclosed, in any event, by § 7806 (b) of the 1954 Code, 26 U. S. C. § 7806 (b), providing that no inference shall be drawn by reason of the location or grouping of any particular section or portion of the tax title of the Code. See *United States* v. *Ryder*, 110 U. S. 729, 740 (1884); *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289, 309 n. 12 (1975). The Commissioner's power to terminate a taxable period under § 6851 and then to assess under § 6201 is not at all dependent upon § 6861, and there is no basis for the incorporation of the notice-of-deficiency requirement of § 6861 (b) into § 6851.

Not only do §§ 6851 and 6861 have separate and independent origins and dates of birth, but their legislative developments in subsequent years are distinctly different. Dealing with jeopardy situations in disparate ways, the statutes should be considered as independent and not as one provision tied to the requirements of the other.

Secondly, the legislative evolution of the two sections and the creation of the Board of Tax Appeals demonstrate that an amount assessed pursuant to a § 6851 termination is not a "deficiency" within the meaning of § 6211. A glance at the 1921 Act reveals the establishment and existence of the administrative appeal which was the predecessor of the later independent review in the Board of Tax Appeals. Section 250 (b) of that Act defined "deficiency" as the difference between "the amount already paid" and "that which should have been paid." When a taxable year is prematurely terminated, the tax "which should have been paid" is indeterminable because none was required to have been paid by that time. Thus, the deficiency concept was inapplicable to an assessment made for a terminated period. No notice of deficiency would be issued for the period, and the administrative appeal under the 1921 Act would not be available.

Exactly the same analysis applies to the definition of "deficiency" under the 1954 Code. Prior to the end of the taxable year neither the Commissioner nor the taxpayer is able to ascertain the tax imposed by the Code. A "deficiency" cannot be determined before the close of a taxable year. The requirement that a notice of deficiency be issued, therefore, does not apply to a § 6851 (a) termination of a taxable period.[12]

I therefore conclude that the Commissioner is not required to issue a notice of deficiency to a taxpayer whose taxable period is terminated pursuant to the provisions of § 6851 (a) of the Code. The statutory scheme does not require this, and the legislative history demonstrates that an assessment pursuant to a termination does not give rise to a "deficiency." From this it follows that, as a statutory matter, the Anti-Injunction Act, § 7421 (a) of the Code, bars the suits by petitioner Laing and respondent Hall to enjoin the assessment and collection of taxes for their respective terminated taxable periods. This conclusion, of course, is not an end to the cases, for there remain the question of remedy available to persons in their position and the constitutional issue that is thereby raised.

IV

The courts that have arrived at a result contrary to the one I reach on the statutory issue have sug-

[12] The Tax Court itself consistently has denied jurisdiction on its part over a period terminated under § 6851 (a), and has done so on the ground that the termination results in "but a provisional statement of the amount which must be presently paid as a protection against the impossibility of collection." *Ludwig Littauer & Co.* v. *Commissioner*, 37 B. T. A. 840, 842 (1938) (reviewed by the Board). See *Puritan Church—The Church of America* v. *Commissioner*, 10 T. C. M. 485, 494 (1951), aff'd, 93 U. S. App. D. C. 129, 209 F. 2d 306 (1953), cert. denied, 347 U. S. 975 (1954); *Jones* v. *Commissioner*, 62 T. C. 1 (1974). See also *Page* v. *Commissioner*, 297 F. 2d 733 (CA8 1962).

gested that this result would produce "significant constitutional problems." *Rambo* v. *United States*, 492 F. 2d, at 1064–1065. See also *Schreck* v. *United States*, 301 F. Supp., at 1281. This constitutional reservation has been prompted by the concern that if a notice of deficiency is not required for a terminated taxable period, the taxpayer does not have the benefit of immediate access to the Tax Court.

To be sure, as has been noted above, Tax Court jurisdiction to determine liability prior to payment is predicated upon the existence of a "deficiency," within the meaning of § 6211 (a), and upon the Commissioner's formal issuance of a notice of deficiency pursuant to § 6212 (a). As a result, notices of deficiency have been described as " 'tickets to the tax court.' " *Corbett* v. *Frank*, 293 F. 2d 501, 502 (CA9 1961). See *Mason* v. *Commissioner*, 210 F. 2d 388 (CA5 1954). But this lack of access to the Tax Court by the taxpayer who finds himself in a terminated taxable period situation does not mean that he is without effective judicial remedy to challenge the Commissioner's action. Lack of access to the Tax Court does not equate with a denial of Fifth Amendment due process if due process is otherwise available. And it is at once apparent that the taxpayer has a variety of remedies to test the validity of the Commissioner's action:

First, a refund suit is possible. Once there is a seizure of any property of the taxpayer in satisfaction of the assessment for the terminated period, the taxpayer may file a claim for refund either by filing the formal claim (Form 843) or by making a short-period return and showing an amount due that is less than the amount seized. See *Rogan* v. *Mertens*, 153 F. 2d 937 (CA9 1946). See also Treas. Reg. § 301.6402–3 (a)(1), 26 CFR § 301.6402–3 (a)(1) (1975). The Commissioner, of course, has

up to six months to process the claim. §§ 6532 (a) and 7422 (a) of the Code, 26 U. S. C. §§ 6532 (a) and 7422 (a). Immediately upon denial of the claim, or upon the expiration of six months with no action by the Commissioner,[13] the taxpayer may commence suit for refund in the district court or in the Court of Claims. See 28 U. S. C. § 1346 (a)(1). The jurisdiction of these courts over a refund suit does not depend upon the existence of a formally asserted "deficiency," as does the jurisdiction of the Tax Court.

Second, the taxpayer subject to a § 6851 termination may await the end of his taxable year and then file a full-year return and claim an overpayment and refund and in due course seek relief in court. See *Irving* v. *Gray*, 479 F. 2d 20, 24 (CA2 1973).

Third, the taxpayer again may await the end of the taxable year and file a full-year return. The Commissioner may then determine that additional tax is due and, if so, the statutory definition of a "deficiency" will be met and a notice of deficiency will issue. When this happens, the taxpayer is in a position to seek a redetermination in the Tax Court, contesting the additional tax so asserted or claiming an overpayment for the year.

Although a taxpayer whose taxable period is terminated thus may not gain immediate access to the Tax Court, he does have available appropriately prompt avenues of relief principally in the district court or in the Court of Claims. There is, of course, no constitutional

[13] The six-month period, of course, is the maximum, not the minimum. Petitioner Laing, in fact, filed a claim for refund on March 1, 1973. It was denied just *eight* days later, on March 9. He was then in a position to sue and did so. Brief for Petitioner Laing 34 n. 11; Brief for United States 7 n. 4.

The maximum six months' wait, in order to accommodate the administrative operation, surely is not *per se* unconstitutional. See *Dodge* v. *Osborn*, 240 U. S. 118, 122 (1916).

requirement that every tax dispute be adjudicable in the Tax Court. In fact, that court's jurisdiction is limited to income, estate, and gift taxes.

It must be made clear that, whether the taxpayer whose taxable period has been terminated files a short-period refund claim or one for a full taxable year, he still may sue for refund even if the value of the property seized is less than the amount of the assessment made against him. There is no requirement in this situation that he pay the full amount of the assessment before he may claim and sue for a refund.

At this point, *Flora* v. *United States,* 357 U. S. 63 (1958), on rehearing, 362 U. S. 145 (1960), deserves comment. In that case the Court held that a federal district court does not have jurisdiction of an action for refund of a part payment made by a taxpayer on an assessment. It ruled that the taxpayer must pay the full amount of the assessment before he may challenge its validity in the court action. Payment of the entire deficiency thus was made a prerequisite to the refund suit. The ruling, however, was tied directly to the jurisdiction of the Tax Court where litigation prior to payment of the tax was the usual order of the day. 362 U. S., at 158–163. The holding thus kept clear and distinct the line between Tax Court jurisdiction and district court jurisdiction. The Court said specifically:

> "A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent." *Id.,* at 175.

This passage demonstrates that the full-payment rule applies only where a deficiency has been noticed, that is,

only where the taxpayer has access to the Tax Court for redetermination prior to payment. This is the thrust of the ruling in *Flora*, which was concerned with the possibility, otherwise, of splitting actions between, and overlapping jurisdiction of, the Tax Court and the district court. *Id.*, at 163, 165–167, 176. Where, as here, in these terminated period situations, there is no deficiency. and no consequent right of access to the Tax Court, there is and can be no requirement of full payment in order to institute a refund suit. The taxpayer may sue for his refund even if he is unable to pay the full amount demanded upon the termination of his taxable period. *Irving* v. *Gray*, 479 F. 2d, at 24–25, n. 6; *Lewis* v. *Sandler*, 498 F. 2d 395, 400 (CA4 1974).

I recognize that on occasion the refund procedure may cause some hardship for the terminated taxpayer whose entire assets may be seized and who may be required to wait as long as six months before filing his refund suit. Indeed, this hardship was one of the reasons for establishing the Board of Tax Appeals as a prepayment forum in the first place. See H. R. Rep. No. 179, 68th Cong., 1st Sess., 7 (1924); S. Rep. No. 398, 68th Cong., 1st Sess., 8 (1924).[14] It is obvious, of course, that when one tax-

[14] I have no hesitancy in recognizing that there is a possibility of abuse in the jeopardy-assessment system. See Note, Narcotics Offenders and the Internal Revenue Code: Sheathing the Section 6851 Sword, 28 Vand. L. Rev. 363 (1975); Note, Jeopardy Terminations Under Section 6851: The Taxpayer's Rights and Remedies, 60 Iowa L. Rev. 644 (1975); Silver, Terminating the Taxpayer's Taxable Year: How IRS Uses it Against Narcotics Suspects, 40 J. of Tax. 110 (1974); Note, Jeopardy Assessment: The Sovereign's Stranglehold, 55 Geo. L. J. 701 (1967); *Willits* v. *Richardson*, 497 F. 2d 240, 246 (CA5 1974). But this possibility is also present with respect to a jeopardy assessment under § 6861. And it is present, too, perhaps with even greater force, in those tax situations (excise, FICA, etc.) where jurisdiction of the Tax Court does not exist and the taxpayer has no ability to litigate prior to payment or seizure. These dif-

payer dishonestly evades his share of the tax burden, that share is shifted to all those who comply with the law. This balance of "hardship" doubtless was in the minds of those who formulated the statutory structure.

It has long been established, moreover, that there is no constitutional requirement for a prepayment forum to adjudicate a dispute over the collection of a tax. *Phillips* v. *Commissioner*, 283 U. S. 589, 595–596 (1931). There, in an opinion by Mr. Justice Brandeis, the Court unanimously held that the taxing authorities may lawfully seize property for payment of taxes in summary proceedings prior to an adjudication of liability where "adequate opportunity is afforded for a later judicial determination of the legal rights." *Id.*, at 595. See *Fuentes* v. *Shevin*, 407 U. S. 67, 91–92, and n. 24 (1972).

In *Phillips* the Court noted the availability of two alternative mechanisms for judicial review in that particular situation: a refund action, or immediate redetermination of liability by the Board of Tax Appeals. In response, however, to a complaint by the taxpayer there that if the Board remedy were sought, collection would not be stayed unless a bond were filed, Mr. Justice Brandeis dismissed the contention with the observation:

> "[I]t has already been shown that the right of the United States to exact immediate payment and to

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fering degrees of tax comfort, in my view, do not render the system, or parts of it, unconstitutional. Prior to 1924, as has been pointed out, there was no prepayment forum at all.

I do not condone abuse in tax collection. The records of these two cases do not convincingly demonstrate abuse, although Mrs. Hall's situation, as it developed after the initial critical moves by the Service, makes one wonder. I have no such concern whatsoever about Mr. Laing. In any event, abuse is subject to rectification otherwise, and the Congress and the courts surely will not be unsympathetic. Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).

> relegate the taxpayer to a suit for recovery, is paramount. The privilege of delaying payment pending immediate judicial review, by filing a bond, was granted by the sovereign as a matter of grace solely for the convenience of the taxpayer." 283 U. S., at 599–600.

Thus, the Court made clear that a prepayment forum was not a requirement of due process. I see no reason whatsoever to depart from that rule in these cases, where the taxpayer may file an action for refund after at most six months from the seizure of his assets or other action taken by the IRS under § 6851.

Accordingly, I dissent. I would affirm the judgment of the United States Court of Appeals for the Second Circuit in No. 73–1808, and I would reverse the judgment of the United States Court of Appeals for the Sixth Circuit in No. 74–75 and remand that case to the United States District Court for the Western District of Kentucky with directions to dismiss the complaint.

BARRETT *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-5566. Argued November 4, 1975—
Decided January 13, 1976

The provision of the Gun Control Act of 1968, 18 U. S. C. § 922 (h), making it unlawful for a convicted felon, *inter alia*, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," *held* to apply to a convicted felon's intrastate purchase from a retail dealer of a firearm that previously, but independently of the felon's receipt, had been transported in interstate commerce from the manufacturer to a distributor and then from the distributor to the dealer. Pp. 215-225.

504 F. 2d 629, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and POWELL, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 225. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 228. STEVENS, J., took no part in the consideration or decision of the case.

Thomas A. Schaffer, by appointment of the Court, 421 U. S. 908, argued the cause and filed a brief for petitioner.

Robert B. Reich argued the cause for the United States *pro hac vice*. With him on the brief were *Solicitor General Bork*, *Acting Assistant Attorney General Keeney*, and *Sidney M. Glazer*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Petitioner Pearl Barrett has been convicted by a jury in the United States District Court for the Eastern Dis-

trict of Kentucky of a violation of 18 U. S. C. § 922 (h),[1] a part of the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213, amending the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197, enacted earlier the same year. The issue before us is whether § 922 (h) has application to a purchaser's intrastate acquisition of a firearm that previously, but independently of the purchaser's receipt, had been transported in interstate commerce from the manufacturer to a distributor and then from the distributor to the dealer.

I

In January 1967, petitioner was convicted in a Kentucky state court of housebreaking. He received a two-year sentence. On April 1, 1972, he purchased a .32-caliber Smith & Wesson revolver over the counter from a Western Auto Store in Booneville, Ky., where petitioner resided.[2] The vendor, who was a local dentist as

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[1] "§ 922. Unlawful acts.

. . . . . .

"(h) It shall be unlawful for any person—

"(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

"(2) who is a fugitive from justice;

"(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201 (v) of the Federal Food, Drug, and Cosmetic Act) or narcotic drug (as defined in section 4731 (a) of the Internal Revenue Code of 1954); or

"(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

"to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

[2] Petitioner at the time of the purchase was not asked to complete Treasury Form 4473, designed for use in the enforcement of the gun control provisions of the statute. Tr. 45–47. Accord-

well as the owner of the store, and who was acquainted with petitioner, was a federally licensed firearms dealer. The weapon petitioner purchased had been manufactured in Massachusetts, shipped by the manufacturer to a distributor in North Carolina, and then received by the Kentucky dealer from the distributor in March 1972, a little less than a month prior to petitioner's purchase. The sale to Barrett was the firearm's first retail transaction. It was the only handgun then in the dealer's stock. Tr. 36–47.

Within an hour after the purchase petitioner was arrested by a county sheriff for driving while intoxicated. The firearm, fully loaded, was on the floorboard of the car on the driver's side.

Petitioner was charged with a violation of § 922 (h). He pleaded not guilty. At the trial no evidence was presented to show that Barrett personally had participated in any way in the previous interstate movement of the firearm. The evidence was merely to the effect that he had purchased the revolver out of the local dealer's stock, and that the gun, having been manufactured and then warehoused in other States, had reached the dealer through interstate channels. At the close of the prosecution's case, Barrett moved for a directed verdict of acquittal on the ground that § 922 (h) was not applicable to his receipt of the firearm.[3] The motion

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ingly, there is no issue here as to the making of any false statement, in violation of § 922 (a)(6). See *Huddleston* v. *United States*, 415 U. S. 814 (1974).

[3] The defense also moved to quash the indictment on the ground that on June 20, 1969, the Governor of Kentucky, by executive order in the nature of a pardon, had granted petitioner "all the rights of citizenship denied him in consequence of said judgment of conviction." It was suggested that this served to wipe out petitioner's state felony conviction of January 1967. The motion to quash was denied. The same argument was made in the Court of

was denied. The court instructed the jury that the statute's interstate requirement was satisfied if the firearm at some time in its past had traveled in interstate commerce.[4] A verdict of guilty was returned. Petitioner received a sentence of three years, subject to the immediate parole eligibility provisions of 18 U. S. C. § 4208 (a)(2).

On appeal, the Court of Appeals affirmed by a divided vote on the question before us. 504 F. 2d 629 (CA6 1974). Because of the importance of the issue and because the Sixth Circuit's decision appeared to have overtones of conflict with the opinion and decision of the United States Court of Appeals for the Eighth Circuit in *United States* v. *Ruffin*, 490 F. 2d 557 (1974), we granted certiorari limited to the § 922 (h) issue. 420 U. S. 923 (1975).

II

Petitioner concedes that Congress, under the Commerce Clause of the Constitution, has the power to regulate interstate trafficking in firearms. Brief for Petitioner 7. He states, however, that the issue before

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Appeals, but that court unanimously rejected it for reasons stated in the court's respective majority and dissenting opinions. 504 F. 2d 629, 632–634 (CA6 1974). The issue is not presented here.

[4] "Now, interstate commerce, ladies and gentlemen, is the movement of something of value from one political subdivision, which we call a state, to another political subdivision, which we call a state. Interstate commerce occurs when something of value crosses a state boundary line. Now, if you believe that from this evidence . . . the firearm in question was manufactured in a state other than Kentucky, then you are entitled to make the permissible inference that in order for that firearm to be physically located in Kentucky, . . . it had to be engaged in interstate transportation at some point or another, but this is a permissible inference. You are not required to make that inference unless you believe from the evidence that that is a logical, reasonable determination to make from the facts." Tr. 99–100.

us concerns the scope of Congress' exercise of that power in this statute. He argues that, in its enactment of § 922 (h), Congress was interested in "the business of gun traffic," Brief for Petitioner 11; that the Act was meant "to deal with *businesses*, not individuals per se" (emphasis in original), *id.*, at 14, that is, with mail-order houses, out-of-state sources, and the like; and that the Act was not intended to, and does not, reach an isolated intrastate receipt, such as Barrett's transaction, where the handgun was sold within Kentucky by a local merchant to a local resident with whom the merchant was acquainted, and where the transaction "has no apparent connection with interstate commerce," despite the weapon's manufacture and original distribution in States other than Kentucky. *Id.*, at 6.

We feel, however, that the language of § 922 (h), the structure of the Act of which § 922 (h) is a part, and the manifest purpose of Congress are all adverse to petitioner's position.

A. Section 922 (h) pointedly and simply provides that it is unlawful for four categories of persons, including a convicted felon, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." The quoted language is without ambiguity. It is directed unrestrictedly at the felon's receipt of any firearm that "has been" shipped in interstate commerce. It contains no limitation to a receipt which itself is part of the interstate movement. We therefore have no reason to differ with the Court of Appeals' majority's conclusion that the language "means exactly what it says." 504 F. 2d, at 632.

It is to be noted, furthermore, that while the proscribed act, "to receive any firearm," is in the present tense, the interstate commerce reference is in the present perfect tense, denoting an act that has been completed.

Thus, there is no warping or stretching of language when the statute is applied to a firearm that already has completed its interstate journey and has come to rest in the dealer's showcase at the time of its purchase and receipt by the felon. Congress knew the significance and meaning of the language it employed. It used the present perfect tense elsewhere in the same section, namely, in § 922 (h)(1) (a person who "has been convicted"), and in § 922 (h)(4) (a person who "has been adjudicated" or who "has been committed"), in contrast to its use of the present tense ("who is") in §§ 922 (h)(1), (2), and (3). The statute's pattern is consistent and no unintended misuse of language or of tense is apparent.

Had Congress intended to confine § 922 (h) to direct interstate receipt, it would have so provided, just as it did in other sections of the Gun Control Act. See § 922 (a)(3) (declaring it unlawful for a nonlicensee to receive in the State where he resides a firearm purchased or obtained "by such person outside that State"); § 922 (j) (prohibiting the receipt of a stolen firearm "moving as . . . interstate . . . commerce"); and § 922 (k) (prohibiting the receipt "in interstate . . . commerce" of a firearm the serial number of which has been removed). Statutes other than the Gun Control Act similarly utilize restrictive language when only direct interstate commerce is to be reached. See, *e. g.*, 18 U. S. C. §§ 659, 1084, 1201, 1231, 1951, 1952, 2313, 2315, and 2421, and 15 U. S. C. § 77e. As we have said, there is no ambiguity in the words of § 922 (h), and there is no justification for indulging in uneasy statutory construction. *United States* v. *Wiltberger*, 5 Wheat. 76, 95–96 (1820); *Yates* v. *United States*, 354 U. S. 298, 305 (1957); *Huddleston* v. *United States*, 415 U. S. 814, 831 (1974). See *United States* v. *Sullivan*, 332 U. S. 689, 696 (1948). There is no occasion here to resort to a rule of lenity,

see *Rewis* v. *United States*, 401 U. S. 808, 812 (1971); *United States* v. *Bass*, 404 U. S. 336, 347 (1971), for there is no ambiguity that calls for a resolution in favor of lenity. A criminal statute, to be sure, is to be strictly construed, but it is "not to be construed so strictly as to defeat the obvious intention of the legislature." *American Fur Co.* v. *United States*, 2 Pet. 358, 367 (1829); *Huddleston* v. *United States*, 415 U. S., at 831.

B. The very structure of the Gun Control Act demonstrates that Congress did not intend merely to restrict interstate sales but sought broadly to keep firearms away from the persons Congress classified as potentially irresponsible and dangerous. These persons are comprehensively barred by the Act from acquiring firearms by any means. Thus, § 922 (d) prohibits a licensee from knowingly selling or otherwise disposing of any firearm (whether in an interstate or intrastate transaction, see *Huddleston* v. *United States*, 415 U. S., at 833) to the same categories of potentially irresponsible persons. If § 922 (h) were to be construed as petitioner suggests, it would not complement § 922 (d), and a gap in the statute's coverage would be created, for then, although the licensee is prohibited from selling either interstate or intrastate to the designated person, the vendee is not prohibited from receiving unless the transaction is itself interstate.

Similarly, § 922 (g) prohibits the same categories of potentially irresponsible persons from shipping or transporting any firearm in interstate commerce or, see 18 U. S. C. § 2 (b), causing it to be shipped interstate. Petitioner's proposed narrow construction of § 922 (h) would reduce that section to a near redundancy with § 922 (g), since almost every interstate shipment is likely to have been solicited or otherwise caused by the direct recipient. That proposed narrow construction would also

create another anomaly: if a prohibited person seeks to buy from his local dealer a firearm that is not currently in the dealer's stock, and the dealer then orders it interstate, that person violates § 922 (h), but under the suggested construction, he would not violate § 922 (h) if the firearm were already on the dealer's shelf.

We note, too, that other sections of the Act clearly apply to and regulate intrastate sales of a gun that has moved in intrastate commerce. For example, the licensing provisions, §§ 922 (a)(1) and 923 (a), apply to exclusively intrastate, as well as interstate, activity. Under § 922 (d), as noted above, a licensee may not knowingly sell a firearm to any prohibited person, even if the sale is intrastate. *Huddleston* v. *United States,* 415 U. S., at 833. Sections 922 (c) and (a)(6), relating, respectively, to a physical presence at the place of purchase and to the giving of false information, apply to intrastate as well as to interstate transactions. So, too, do §§ 922 (b)(2) and (5).

Construing § 922 (h) as applicable to an intrastate retail sale that has been preceded by movement of the firearm in interstate commerce is thus consistent with the entire pattern of the Act. To confine § 922 (h) to direct interstate receipts would result in having the Gun Control Act cover every aspect of intrastate transactions in firearms except receipt. This, however, and obviously, is the most crucial of all. Congress surely did not intend to except from the direct prohibitions of the statute the very act it went to such pains to prevent indirectly, through complex provisions, in the other sections of the Act.

C. The legislative history is fully supportive of our construction of § 922 (h). The Gun Control Act of 1968 was an amended and, for present purposes, a substantially identical version of Title IV of the Omnibus Crime

Control and Safe Streets Act of 1968. Each of the statutes enlarged and extended the Federal Firearms Act, 52 Stat. 1250 (1938). Section 922 (h), although identical in its operative phrase with § 2 (f) of the Federal Firearms Act, expanded the categories of persons prohibited from receiving firearms.[5] The new Act also added many prophylactic provisions, hereinabove referred to, governing intrastate as well as interstate transactions. See Zimring, Firearms and Federal Law: The Gun Control Act of 1968, 4 J. Legal Studies 133 (1975). But the 1938 Act, it was said, was designed "to prevent the crook and gangster, racketeer and fugitive from justice from being able to purchase or in any way come in contact with firearms of any kind." S. Rep. No. 1189, 75th Cong., 1st Sess., 33 (1937). Nothing we have found in the committee reports or hearings on the 1938 legislation indicates any intention on the part of Congress to confine § 2 (f) to direct interstate receipt of firearms.

The history of the 1968 Act reflects a similar concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons. Its broadly stated principal purpose was "to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). See also 114 Cong. Rec. 13219 (1968) (remarks by Sen. Tydings); *Huddleston* v. *United States*, 415 U. S., at 824–825. Congressman Celler, the House Manager, expressed the same concern: "This bill seeks to maximize the possibility

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[5] Section 2 (f) provided:

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugutive [*sic*] from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce . . . ." 52 Stat. 1251.

of keeping firearms out of the hands of such persons." 114 Cong. Rec. 21784 (1968); *Huddleston* v. *United States,* 415 U. S., at 828. In the light of this principal purpose, Congress could not have intended that the broad and unambiguous language of § 922 (h) was to be confined, as petitioner suggests, to direct interstate receipts. That suggestion would remove from the statute the most usual transaction, namely, the felon's purchase or receipt from his local dealer.

III

Two statements of this Court in past cases, naturally relied upon by petitioner, deserve mention. The first is an observation made over 30 years ago in reference to the 1938 Act's § 2 (f), the predecessor of § 922 (h):

> "Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct." *Tot* v. *United States,* 319 U. S. 463, 466 (1943).

In that case, the Court held that the presumption contained in § 2 (f), to the effect that "the possession of a firearm or ammunition by any such person [one convicted of a crime of violence or a fugitive from justice] shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act," was violative of due process.

The quoted observation, of course, is merely a recital as to what the District Court and the Court of Appeals in that case had held and a further statement that the Government had agreed that the construction by the

lower courts was correct. Having made this observation, the Court then understandably moved on to the only issue in *Tot*, namely, the validity of the statutory presumption. The fact that the Government long ago took a narrow position on the reach of the 1938 Act may not serve to help its posture here, when it seemingly argues to the contrary, but it does not prevent the Government from arguing that the current gun control statute is broadly based and reaches a purchase such as that made by Barrett.[6]

The second statement is more recent and appears in *United States* v. *Bass, supra*.[7] The *Bass* comment, of course, is dictum, for *Bass* had to do with a prosecution under 18 U. S. C. App. § 1202 (a), a provision which was part of Title VII, not of Title IV, of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Section 1202 (a) concerned any member of stated categories of persons "who receives, possesses, or transports in commerce or affecting commerce . . . any firearm." The Government contended that the statute did not require proof of a connection with interstate commerce. The Court held, however, that the statute was ambiguous and that, therefore, it must be read to require such a nexus. In so holding, the Court noted the connection between Title VII and Title IV, and observed that although sub-

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[6] There is, of course, no rule of law to the effect that the Government must be consistent in its stance in litigation over the years. It has changed positions before. See, *e. g., Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180, 183 (1957).

[7] "Even under respondent's view, a Title VII offense is made out if the firearm was possessed or received 'in commerce or affecting commerce'; however, Title IV apparently does not reach possessions or intrastate transactions at all, even those with an interstate commerce nexus, but is limited to the sending or receiving of firearms as part of an interstate transportation." 404 U. S., at 342–343.

sections of the two Titles addressed their prohibitions to some of the same people, each also reached groups not reached by the other. Then followed the dictum in question. The Court went on to state:

> "While the reach of Title IV itself is a question to be decided finally some other day, the Government has presented here no learning or other evidence indicating that the 1968 Act changed the prior approach to the 'receipt' offense." 404 U. S., at 343 n. 10.

The *Bass* dictum was just another observation made in passing as the Court proceeded to consider § 1202 (a). The observation went so far as to intimate that Title IV was to be limited even with respect to a transaction possessing an interstate commerce nexus, a situation that Barrett here concedes *is* covered by § 922 (h). In any event, the Court, by its statement in n. 10 of the *Bass* opinion, reserved the question of the reach of Title IV for "some other day." That day is now at hand, with Barrett's case before us. And it is at hand with the benefit of full briefing and an awareness of the plain language of § 922 (h), of the statute's position in the structure of the entire Act, and of the legislative aims and purpose.

Furthermore, we are not willing to decide the present case on the assumption that Congress, in passing the Gun Control Act 25 years after *Tot* was decided, had the Court's casual recital in *Tot* in mind when it used language identical to that in the 1938 Act.[8] There is

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[8] "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber* v. *Allen*, 396 U. S. 168, 185–186, n. 21 (1969).

one mention of *Tot* in the debates, 114 Cong. Rec. 21807 (1968), and one mention in the reports, S. Rep. No. 1097, 90th Cong., 2d Sess., 272 (1968) (additional views of Sens. Dirksen, Hruska, Thurmond, and Burdick). These reflect a concern with the fact that *Tot* eliminated the presumption of interstate movement, thus increasing the burden of proof on the Government. They do not focus on what showing was necessary to carry that burden of proof. Similarly, the few references to *Tot* in the hearings reflect objections to the elimination of the presumption, but mention only in passing the type of proof that the witness believed was necessary to satisfy § 2 (f). See, *e. g.*, Hearings on S. 1, Amendment 90 to S. 1, S. 1853, and S. 1854 before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 46 (1967); Hearings on H. R. 5037, H. R. 5038, H. R. 5384, H. R. 5385, and H. R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 561–562, 564, 677–678. Nothing in this legislative history persuades us that Congress intended to adopt *Tot*'s limited interpretation. If we were to conclude otherwise, we would fly in the face of, and ignore, obvious congressional intent at the price of a passing recital. See *Girouard* v. *United States*, 328 U. S. 61, 69–70 (1946). To hold, as the Court did in *Bass*, 404 U. S., at 350, that Title VII, directed to a receipt of any firearm "in commerce or affecting commerce," requires only a showing that the firearm received previously traveled in interstate commerce, but that Title IV, relating to a receipt of any firearm "which has been shipped or transported in interstate . . . commerce," is limited to the receipt of the firearm as part of an interstate movement, would be inconsistent construction of sections of the same Act and,

indeed, would be downgrading the stronger language and upgrading the weaker.

We conclude that § 922 (h) covers the intrastate receipt, such as petitioner's purchase here, of a firearm that previously had moved in interstate commerce. The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

In meeting petitioner's contention that *Tot* v. *United States,* 319 U. S. 463 (1943), necessarily confines the offense created by 18 U. S. C. § 922 (h) to the receipt of a firearm in the course of an interstate shipment, the Court reads the *Tot* opinion as reciting but not adopting the lower courts' holdings that § 2 (f) of the Federal Firearms Act of 1938 did not cover the intrastate receipt of a firearm that previously had moved in interstate commerce. *Ante,* at 221–222. I join the Court in this respect. Also, I find its construction of § 922 (h) to be correct even if it is assumed, as MR. JUSTICE STEWART concludes, *post,* at 228–230, and n. 3, that the *Tot* decision did adopt the more limited construction of § 2 (f).

Section 2 (f) of the Federal Firearms Act of 1938, 52 Stat. 1251, at issue in *Tot,* read as follows:

> "It shall be unlawful for any person who has been convicted of a crime of violence or is a fug[i]tive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammuni-

tion was shipped or transported or received, as the case may be, by such person in violation of this Act."

The opening words of the section broadly describing the statutory violation as receiving a firearm which "has been shipped or transported" in interstate commerce were immediately followed by a provision that it could be presumed from possession alone that the defendant-possessor had personally participated in the interstate movement of the possessed firearm. Had Congress intended to proscribe the mere intrastate receipt by a defendant of a gun which had previously moved in interstate commerce without any involvement by the defendant in that movement, there would have been little or no reason to provide that his personal participation in the interstate movement could be inferred from his possession alone. Proof of personal possession and previous interstate movement independent of any act of the defendant, which would be sufficient to make out intrastate receipt of a firearm which had previously moved in interstate commerce, requires no such presumptive assistance.

In this light it is not surprising that the otherwise broad language of the statute, which was not limited to receipts that were themselves part of the interstate movement, was nonetheless understood to reach only receipts directly involved in interstate commerce. *Tot* v. *United States, supra,* it is argued, so understood the statute. Striking down the presumption did not remove this gloss from the language defining the violation. Thus after *Tot,* and as long as Congress left § 2 (f) intact, to establish a violation of § 2 (f) it was necessary to prove that a convicted felon found in possession of a firearm actually participated in an interstate shipment.

When § 922 (h) was enacted, however, Congress

omitted the presumptive language of the prior statute and removed any basis for reading the plain language of the statute to reach only receipts of firearms which have moved in interstate commerce with the aid or participation of the defendant. That the plain language of § 922 (h) contains no limitation to receipts which are themselves part of an interstate movement is not disputed. Instead the argument is that by reenacting the initial language of § 2 (f) Congress intended to maintain the restricted meaning even though it dropped the presumption which had provided the gloss and added nothing in its stead.

It is noted that Congress was aware that after *Tot*, "in order to establish a violation of this statute, it is necessary to prove that a convicted felon found in possession of a firearm actually received it in the course of an interstate shipment."* From this it is inferred that in enacting § 922 (h) Congress adopted *Tot*'s interpretation of the glossed language of § 2 (f). But the quoted statement simply describes the continuing effect of the gloss provided by the language of the invalidated presumption in § 2 (f). Congressional awareness of the effect of *Tot* does not overcome the concededly plain language of § 922 (h) or the force of the Court's analysis of the statutory scheme of which it is a part. *Ante*, at 216–219. Indeed I find that congressional understanding of the history of § 2 (f), first with and then without its presumption, supports the Court's determination that § 922 (h) "covers the intrastate receipt . . . of a firearm

*Hearings on S. 1, Amendment 90 to S. 1, S. 1853, and S. 1854 before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 46 (1967). See also Hearings on H. R. 5037, H. R. 5038, H. R. 5384, H. R. 5385, and H. R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 561 (1967).

that previously had moved in interstate commerce." *Ante,* at 225.

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The petitioner in this case, a former convict, was arrested for driving while intoxicated. A revolver, fully loaded, was found on the floorboard of his car. These circumstances are offensive to those who believe in law and order. They are particularly offensive to those concerned with the need to control handguns. While I understand these concerns, I cannot join the Court in its rush to judgment, because I believe that as a matter of law the petitioner was simply not guilty of the federal statutory offense of which he stands convicted.

The petitioner bought a revolver from the Western Auto Store in Booneville, Ky., in an over-the-counter retail sale. Within an hour, he was arrested for driving while intoxicated and the revolver was found on the floorboard of his car. The revolver had been manufactured in Massachusetts and shipped to the Booneville retailer from a North Carolina distributor. The prosecution submitted no evidence of any kind that the petitioner had participated in any interstate activity involving the revolver, either before or after its purchase. On these facts, he was convicted of violating 18 U. S. C. § 922 (h), which makes it unlawful for a former criminal offender like the petitioner, "to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

This clause first appeared in the predecessor of § 922 (h), § 2 (f) of the Federal Firearms Act of 1938, 52 Stat. 1250, 1251.[1] In *Tot* v. *United States,* 319

[1] Section 2 (f) of the Federal Firearms Act provided:

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fug[i]tive from justice to receive any

U. S. 463 (1943), the Court interpreted this statutory language to prohibit only receipt of firearms or ammunition as part of an interstate transaction:

> "Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that this construction is correct." *Id.*, at 466.

Although the *Tot* Court was principally concerned with the constitutionality of the presumption established by the last clause of § 2 (f),[2] its interpretation of the first clause of the statute was essential to its holding.[3] The statutory presumption was that possession of a firearm or ammunition by any person in the class specified in § 2 (f) established receipt in violation of the statute. The Court in *Tot* held the presumption unconstitutional for lack of a rational connection between the fact proved

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firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

[2] See n. 1, *supra*.

[3] The Court today reads the *Tot* opinion as only attributing this interpretation to the courts below and to the Government, and not as adopting it. *Ante*, at 221–222. This reading is mistaken, for in rejecting an argument premised on the power of Congress to prohibit all possession of firearms by felons, the *Tot* opinion stated:

"[I]t is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition *in interstate commerce*." 319 U. S., at 472 (emphasis added).

and the facts presumed. 319 U. S., at 467–468. The Court could not have reached that decision without first determining what set of facts needed to exist in order to constitute a violation of the statute.

The *Tot* case did not go unnoticed when 18 U. S. C. § 922 (h) was enacted in its present form in 1968, as the legislative history clearly reveals. Subcommittees of both the Senate and House Judiciary Committees in 1967 conducted hearings on bills to amend the Federal Firearms Act. At both hearings, the Commissioner of Internal Revenue explained the decision in *Tot:*

> "The Supreme Court declared [the presumption in § 2 (f)] unconstitutional in a 1943 case, *Tot* v. *United States,* 319 U. S. 463. Consequently, in order to establish a violation of this statute, it is necessary to prove that a convicted felon found in possession of a firearm actually received it in the course of an interstate shipment." Hearings on S. 1, Amendment 90 to S. 1, S. 1853, and S. 1854 before Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., 46 (1967).
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> "The Supreme Court has declared [the presumption in § 2 (f)] unconstitutional. In order to establish the violation of the statute it is necessary to find that the felon found in possession of the firearm actually received it in the course of interstate commerce or transportation." Hearings on H. R. 5037, H. R. 5038, H. R. 5384, H. R. 5385, and H. R. 5386 before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess., 561 (1967).[4]

In both hearings, the Commissioner was speaking in support of bills that omitted the presumption held un-

[4] See also these Hearings, at 575 (statement of Commissioner of Internal Revenue), 629–630, 677–678 (statements of other witnesses).

constitutional in *Tot*, but that otherwise retained the same language there construed. See Hearings on S. 1, Amendment 90 to S. 1, S. 1853, and S. 1854, *supra*, at 16, 43–44; Hearings on H. R. 5037, H. R. 5038, H. R. 5384, H. R. 5385, and H. R. 5386, *supra*, at 13, 555. That is precisely the form in which the statute now before us, § 922 (h), was enacted in 1968. It is thus evident that Congress was aware of *Tot* and adopted its interpretation of the statutory language in enacting the present law. See *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 449–450 (1948); *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 488–489 (1940); *Commissioner* v. *Estate of Church*, 335 U. S. 632, 682, 690 (1949) (Frankfurter, J., dissenting).[5]

Just four years ago, in *United States* v. *Bass*, 404 U. S. 336 (1971), the Court expressly stated that it found nothing to indicate "that the 1968 Act changed the prior approach to the 'receipt' offense." *Id.*, at 343 n. 10. I would adhere to the Court's settled interpretation of the statutory language here involved and reverse the judgment of the Court of Appeals.

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[5] The cases relied upon by the Court, *ante*, at 223 n. 8 and 224, stand for the quite different proposition that where it *cannot* be shown that Congress was aware of a decision of this Court interpreting a statute, such awareness cannot be presumed: *Zuber* v. *Allen*, 396 U. S. 168, 185–186, n. 21 (1969); *Girouard* v. *United States*, 328 U. S. 61, 69–70 (1946).

FOREMOST-McKESSON, INC. *v.* PROVIDENT SECURITIES CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-742. Argued October 7, 1975—Decided January 13, 1976

Respondent, a personal holding company contemplating liquidation, sold assets to petitioner corporation. Respondent received from petitioner as part of the purchase price convertible debentures which if converted into petitioner's common stock would make respondent a holder of more than 10% of petitioner's outstanding common stock. A few days later, pursuant to an underwriting agreement, one of the debentures was sold to a group of underwriters for cash in an amount exceeding its face value. After making debenture and cash distributions to its stockholders, respondent dissolved. Under § 16 (b) of the Securities Exchange Act of 1934 (Act) a corporation may recover for itself the profits realized by an officer, director, or beneficial owner of more than 10% of its shares from a purchase and sale of its stock within a six-month period. An exemptive provision specifies, however, that § 16 (b) shall not be construed to cover any transaction where the beneficial owner was not such both "at the time of" the purchase and sale of the securities involved. Since the amount of petitioner's debentures received by respondent was large enough to make respondent a beneficial owner of petitioner within the meaning of § 16, and its disposal of the securities within the six-month period exposed respondent to a suit by petitioner to recover profits realized by respondent on the sale to the underwriters, respondent sought a declaratory judgment of its nonliability under § 16 (b). The District Court granted summary judgment to respondent, and the Court of Appeals affirmed, though for different reasons. *Held:* By virtue of the exemptive provision a beneficial owner is accountable under § 16 (b) in a purchase-sale sequence such as was involved here only if he was such an owner "before the purchase." Thus, the fact that respondent was not a beneficial owner before the purchase removed the transaction from the operation of § 16 (b). Pp. 239–259.

(a) The legislative history of the exemptive provision reveals a legislative intent to deter beneficial owners from making both

a purchase and a sale on the basis of inside information, which is presumptively available only after the purchase. Pp. 243–250.

(b) Had it been Congress' design when it enacted § 16 (b) to impose liability in cases such as this, it should have done so expressly or by unmistakable inference. Pp. 251–252.

(c) Congress may have sought to distinguish between purchases by persons who have not yet acquired inside status through stock ownership of at least 10% and purchases by directors and officers because the latter are more intimately involved in corporate affairs. Pp. 253–254.

(d) Other sanctions remain available against fraudulent use of inside information in transactions not covered by § 16 (b). Pp. 254–256.

(e) Other provisions exempting certain transactions from § 16 (b) are not inconsistent with the "before the purchase" construction reached here. Pp. 256–259.

506 F. 2d 601, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined, and in all but Part IV–C of which WHITE, J., joined. STEVENS, J., took no part in the consideration or decision of the case.

Morton Moskin argued the cause for petitioner. With him on the briefs were *Thomas McGanney* and *Philip E. Diamond.*

Noble K. Gregory argued the cause for respondent. With him on the brief were *John B. Bates* and *Walter R. Allan.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents an unresolved issue under § 16 (b)

**S. Hazard Gillespie* filed a brief for Allis-Chalmers Manufacturing Co. as *amicus curiae* urging reversal.

Whitney North Seymour, John A. Guzzetta, Bernhardt K. Wruble, and *Conrad K. Harper* filed a brief for Gulf & Western Industries, Inc., as *amicus curiae* urging affirmance.

of the Securities Exchange Act of 1934 (Act), 48 Stat. 896, 15 U. S. C. § 78p (b). That section of the Act was designed to prevent a corporate director or officer or "the beneficial owner of more than 10 per centum" of a corporation [1] from profiteering through short-swing securities transactions on the basis of inside information. It provides that a corporation may capture for itself the profits realized on a purchase and sale, or sale and purchase, of its securities within six months by a director, officer, or beneficial owner.[2] Section 16 (b)'s last sentence,

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[1] The corporate "insiders" whose trading is regulated by § 16 (b) are defined in § 16 (a) of the Act, 15 U. S. C. § 78p (a), as "[e]very person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security."

[2] Section 16 (b), 15 U. S. C. § 78p (b), reads in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any trans-

however, provides that it "shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved . . . ." The question presented here is whether a person purchasing securities that put his holdings above the 10% level is a beneficial owner "at the time of the purchase" so that he must account for profits realized on a sale of those securities within six months. The United States Court of Appeals for the Ninth Circuit answered this question in the negative. 506 F. 2d 601 (1974). We affirm.

I

Respondent, Provident Securities Co., was a personal holding company. In 1968 Provident decided tentatively to liquidate and dissolve, and it engaged an agent to find a purchaser for its assets. Petitioner, Foremost-McKesson, Inc., emerged as a potential purchaser, but extensive negotiations were required to resolve a disagreement over the nature of the consideration Foremost would pay. Provident wanted cash in order to facilitate its dissolution, while Foremost wanted to pay with its own securities.

Eventually a compromise was reached, and Provident and Foremost executed a purchase agreement embodying their deal on September 25, 1969. The agreement provided that Foremost would buy two-thirds of Provident's assets for $4.25 million in cash and $49.75 million in Foremost convertible subordinated debentures.[3] The agreement further provided that Foremost would register under the Securities Act of 1933 $25 million in

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action or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

[3] The debentures were issued expressly to acquire Provident's assets, and all of them were used for that purpose.

principal amount of the debentures and would participate in an underwriting agreement by which those debentures would be sold to the public. At the closing on October 15, 1969, Foremost delivered to Provident the cash and a $40 million debenture which was subsequently exchanged for two debentures in the principal amounts of $25 million and $15 million. Foremost also delivered a $2.5 million debenture to an escrow agent on the closing date. On October 20 Foremost delivered to Provident a $7.25 million debenture representing the balance of the purchase price. These debentures were immediately convertible into more than 10% of Foremost's outstanding common stock.

On October 21 Provident, Foremost, and a group of underwriters executed an underwriting agreement to be closed on October 28. The agreement provided for sale to the underwriters of the $25 million debenture. On October 24 Provident distributed the $15 million and $7.25 million debentures to its stockholders, reducing the amount of Foremost common into which the company's holdings were convertible to less than 10%. On October 28 the closing under the underwriting agreement was accomplished.[4] Provident thereafter distributed the cash proceeds of the debenture sale to its stockholders and dissolved.

Provident's holdings in Foremost debentures as of October 20 were large enough to make it a beneficial owner of Foremost within the meaning of § 16.[5] Having

[4] The underwriters delivered $25,366,666.66 in cash to Provident. That amount represented a purchase price of 101¼% of the principal amount of the debenture ($25,312,500) plus interest accrued from October 15 to the date of closing ($54,166.66). The amount of profit realized by Provident has never been established.

[5] A beneficial owner is one who owns more than 10% of an "equity security" registered pursuant to § 12 of the Act, 15 U. S. C. § 78*l*. See n. 1, *supra*. The owner of debentures convertible into more than

acquired and disposed of these securities within six months, Provident faced the prospect of a suit by Foremost to recover any profits realized on the sale of the debenture to the underwriters. Provident therefore sued for a declaration that it was not liable to Foremost under § 16 (b). The District Court granted summary judgment for Provident, and the Court of Appeals affirmed.

Provident's principal argument below for nonliability was based on *Kern County Land Co.* v. *Occidental Corp.*, 411 U. S. 582 (1973). There we held that an "unorthodox transaction" in securities that did not present the possibility of speculative abuse of inside information was not a "sale" within the meaning of § 16 (b). Provident contended that its reluctant acceptance of Foremost debentures in exchange for its assets was an "unorthodox transaction" not presenting the possibility of speculative abuse and therefore was not a "purchase" within the meaning of § 16 (b). Although the District Court's pre-*Kern County* opinion had adopted this type of analysis, 331 F. Supp. 787 (ND Cal. 1971), the Court of Appeals rejected it, reasoning that Provident's acquisition of the debentures was not "unorthodox" and that the circumstances did not preclude the possibility of speculative abuse. 506 F. 2d, at 604–605.

The Court of Appeals then considered two theories of nonliability based on § 16 (b)'s exemptive provision: "This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale

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10% of a corporation's registered common stock is a beneficial owner within the meaning of the Act. §§ 3 (a)(10), (11) of the Act, 15 U. S. C. §§ 78c (a)(10), (11); Rule 16a–2 (b), 17 CFR § 240.16a–2 (b) (1975). Foremost's common stock was registered; thus Provident's holdings made it a beneficial owner.

and purchase . . . ." The first was Provident's argument that it was not a beneficial owner "at the time of . . . sale." After the October 24 distribution of some debentures to stockholders, the debentures held by Provident were convertible into less than 10% of Foremost's outstanding common stock. Provident contended that its sale to the underwriters did not occur until the underwriting agreement was closed on October 28. If this were the case, the sale would not have been covered by § 16 (b), since Provident would not have been a beneficial owner "at the time of . . . sale."[6] The Court of Appeals rejected this argument because it found that the sale occurred on October 21 upon execution of the underwriting agreement.[7]

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[6] This contention was based on *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972). There the Court held that a sale made after a former beneficial owner had already reduced its holdings below 10% was exempted from § 16 (b) by the phrase "at the time of . . . sale" in the exemptive provision. See n. 25, *infra*.

[7] Section 3 (a)(14) of the Act, 15 U. S. C. § 78c (a)(14), defines "sale" and "sell" to include "any contract to sell or otherwise dispose of." But Provident argued that the October 28 closing date was the day of sale because contractual conditions prevented the contract from becoming binding until closing. The underwriting agreement provided in paragraph 7:

"7. Termination of Agreement: This agreement may be terminated, prior to the time the Registration Statement becomes effective, by you or by any group of Underwriters which has agreed hereunder to purchase in the aggregate at least 50% of the Debentures, if, in your judgment or in the judgment of any such group of Underwriters, there shall have occurred a material unfavorable change in political, financial or economic conditions generally." App. A134.

And in paragraph 5, the agreement provided: "The several obligations of the Underwriters hereunder are subject to the following conditions:

"(h) That, between the time of execution of this agreement and the time of purchase, there shall occur no material and unfavorable

The Court of Appeals then turned to the theory of nonliability based on the exemptive provision that we consider here.[8] It held that in a purchase-sale sequence the phrase "at the time of the purchase," "must be construed to mean prior to the time when the decision to purchase is made." 506 F. 2d, at 614. Thus, although Provident became a beneficial owner of Foremost by acquiring the debentures, it was not a beneficial owner "at the time of the purchase." Accordingly, the exemptive provision prevented any § 16 (b) liability on Provident's part.

II

The meaning of the exemptive provision has been disputed since § 16 (b) was first enacted. The discussion has focused on the application of the provision to

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change, financial or otherwise (other than as referred to in the Registration Statement and the Prospectus), in the condition of the Company and its consolidated subsidiaries as a whole; and the Company will, at the time of purchase, deliver to you a certificate of two of its executive officers to the foregoing effect." App. A134.

The Court of Appeals agreed that conditions to performance might prevent a contract from being a "sale" prior to closing. But it ruled that all significant conditions here were satisfied when the registration statement required by paragraph 7 became effective on October 21, the day the underwriting agreement was executed. The court also found that after October 21, Provident was no longer subject to the risk of a decline in the market for Foremost's stock. 506 F. 2d, at 607. For reasons not apparent from its opinion, the court did not address the possibility that paragraph 5 (h) left Provident subject to market risks. See n. 8, *infra*.

[8] Our holding on this issue disposes of this case by precluding any liability on Provident's part. We therefore do not consider whether the Court of Appeals properly rejected Provident's arguments based on *Kern County Land Co.* v. *Occidental Corp.*, 411 U. S. 582 (1973), and on the sale's not having occurred until October 28.

a purchase-sale sequence, the principal disagreement being whether "at the time of the purchase" means "before the purchase" or "immediately after the purchase." [9] The difference in construction is determinative of a beneficial owner's liability in cases such as Provident's where such owner sells within six months of purchase the securities the acquisition of which made him a beneficial owner. The commentators divided immediately over which construction Congress intended,[10] and they remain divided.[11] The Courts of Appeals also are in disagreement over the issue.

The question of what Congress intended to accomplish by the exemptive provision in a purchase-sale sequence came to a Court of Appeals for the first time in *Stella* v. *Graham-Paige Motors Corp.*, 232 F. 2d 299 (CA2), cert. denied, 352 U. S. 831 (1956). There the Court of Appeals for the Second Circuit without discussion, but over a dissent, affirmed the District Court's

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[9] The alternative construction to "before the purchase" is sometimes denominated "simultaneously with the purchase," as it was by the Court of Appeals. 506 F. 2d, at 608.

[10] Compare C. Meyer, The Securities Exchange Act of 1934, p. 112 (1934) (adopting a "before" construction), with Seligman, Problems Under the Securities Exchange Act, 21 Va. L. Rev. 1, 19–20 (1934) (adopting an "immediately after" construction).

[11] Compare, *e. g.*, Munter, Section 16 (b) of the Securities Exchange Act of 1934: An Alternative to "Burning Down the Barn in Order to Kill the Rats," 52 Cornell L. Q. 69, 74–75 (1966); Note, Insider Liability for Short-Swing Profits: The Substance and Function of the Pragmatic Approach, 72 Mich. L. Rev. 592, 616–619 (1974); Comment, 9 Stan. L. Rev. 582 (1957) (adopting a "before" construction), with, *e. g.*, 2 L. Loss, Securities Regulation 1060 (2d ed. 1961) (favoring an "immediately after" construction). The weight of the commentary appears to be with the "before the purchase" construction. The ALI Federal Securities Code (Tentative Draft No. 2, 1973), § 1413 (d) and Comment (6), considers the "immediately after the purchase" construction "questionable" on the statutory language and proposes an amendment to codify the result.

adoption of the "immediately after the purchase" construction. That court had been impelled to this construction at least in part by concern over what the phrase "at the time of . . . purchase" means in a sale-repurchase sequence, reasoning:

> "If the ['before the purchase'] construction urged by [Graham-Paige] is placed upon the exemption provision, it would be possible for a person to purchase a large block of stock, sell it out until his ownership was reduced to less than 10%, and then repeat the process, ad infinitum." 104 F. Supp. 957, 959 (SDNY 1952).

The District Court may have thought that "before the purchase" seemed an unlikely construction of the exemptive provision in a sale-repurchase sequence, so it could not be the proper construction in a purchase-sale sequence.[12] The *Stella* construction of the exemptive provision has been adhered to in the Second Circuit, *Newmark* v. *RKO General, Inc.*, 425 F. 2d 348, 355–356, cert. denied, 400 U. S. 854 (1970);[13] *Perine* v.

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[12] *Stella* was decided before § 10 (b) of the Act, 15 U. S. C. § 78j (b), as implemented by Rule 10b–5, 17 CFR § 240.10b–5 (1975), developed fully as a private remedy for actual abuses of inside information. See 6 L. Loss, *supra*, n. 11, at 3559. The sale-repurchase abuse that worried the *Stella* court would now invite § 10 (b) liability, see n. 29, *infra*, as well as possible liability under § 16 (b).

[13] To rationalize its view as applied to the purchase-sale sequence, the court in *Newmark* wrote:

"[T]he presumed access to [inside] information resulting from [the] purchase [that makes one a beneficial owner] provides him with an opportunity, not available to the investing public, to sell his shares at the moment most advantageous to him. Thus, a purchase of shares which makes the buyer an insider creates an opportunity for the type of speculative abuse the statute was enacted to prevent." 425 F. 2d, at 356.

William Norton & Co., 509 F. 2d 114, 118 (1974), and adopted by the Court of Appeals for the Eighth Circuit. *Emerson Electric Co.* v. *Reliance Electric Co.*, 434 F. 2d 918, 923–924 (1970), aff'd on other grounds, 404 U. S. 418 (1972).[14] But in none of the foregoing cases did the court examine critically the legislative history of § 16 (b).

The Court of Appeals considered this case against the background, sketched above, of ambiguity in the pertinent statutory language, continued disagreement among the commentators, and a perceived absence in the relatively few decided cases of a full consideration of the purpose and legislative history of § 16 (b). The court found unpersuasive the rationales offered in *Stella* and its progeny for the "immediately after the purchase" construction. It noted that construing the provision to require that beneficial-ownership status exist before the purchase in a purchase-sale sequence would not foreclose an "immediately after the purchase" construction in a sale-repurchase sequence.[15] 506 F. 2d, at 614–615. More significantly, the Court of Appeals challenged directly the premise of the earlier cases that a "before the purchase" construction in a purchase-sale sequence would allow abuses Congress intended to abate. The court reasoned that in § 16 (b) Congress intended to reach only those beneficial owners who both bought and sold on the basis of inside information, which was pre-

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[14] When this Court decided *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972), the question presented here was no longer in the case. See n. 25, *infra*.

[15] The view of the Court of Appeals that "at the time of" may mean different things in different contexts is not unique. See *Allis-Chalmers Mfg. Co.* v. *Gulf & Western Industries*, 527 F. 2d 335 (CA7 1975), cert. pending, No. 75–580. We express no opinion here on this view.

sumptively available to them only after they became statutory "insiders." 506 F. 2d, at 608–614.[16]

III

A

The general purpose of Congress in enacting § 16 (b) is well known. See *Kern County Land Co.*, 411 U. S., at 591–592; *Reliance Electric Co.*, 404 U. S., at 422, and the authorities cited therein. Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors. In § 16 (b) Congress sought to "curb the evils of insider trading [by] . . . taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great." *Reliance Electric Co., supra,* at 422. It accomplished this by defining directors, officers, and beneficial owners as those presumed to have access to inside information[17] and enacting a flat rule

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[16] Shortly before this case was argued the Court of Appeals for the Seventh Circuit reached the same conclusion on somewhat different analysis. *Allis-Chalmers Mfg. Co., supra,* at 347–349. The court apparently would have reached its result even in the absence of the exemptive provision, reasoning that § 16 (b) covers no transactions by any § 16 (b) insiders who were not insiders before their initial transaction. *Id.*, at 347–348. Since we rely on the exemptive provision, we intimate no view on the proper analysis of a case where a director or officer makes an initial transaction before obtaining insider status. See, *e. g., Adler* v. *Klawans,* 267 F. 2d 840 (CA2 1959). Nor do we have occasion here to assess the approach taken by the Court of Appeals for the Seventh Circuit to the exemptive provision. 527 F. 2d, at 348–349, and n. 13. See n. 25, *infra.*

[17] The purpose of § 16 (b) is stated explicitly to be "preventing the unfair use of information which may have been obtained by

that a corporation could recover the profits these insiders made on a pair of security transactions within six months.[18]

Foremost points to this purpose, and invokes the observation in *Reliance Electric Co.* that "where alternative constructions of the terms of § 16 (b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." 404 U. S., at 424 (footnote omitted). From these premises Foremost argues that the Court of Appeals' construction of the exemptive provision must be rejected[19] because it makes § 16 (b) inapplicable to some possible abuses of inside information that the statute would reach under the *Stella* construction.[20] We find this approach unsatisfactory in its focus on situations that § 16 (b) may not reach rather than on the language and purpose of the exemptive provision itself. Foremost's approach also invites an imposition of § 16 (b)'s liability without fault that is not consistent with the premises upon which Congress enacted the section.

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such beneficial owner, director, or officer by reason of his relationship to the issuer." 15 U. S. C. § 78p (b).

[18] Section 16 (b) states that any short-swing profits "shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months." 15 U. S. C. § 78p (b).

[19] In lieu of the Court of Appeals' construction, Foremost offers a construction whereby any purchases prior to the purchase making one a beneficial owner are exempted from the operation of § 16 (b). See 2 Loss, *supra*, n. 11, at 1060.

[20] *Newmark* describes a possible abuse of inside information covered only under the *Stella* construction. See n. 13, *supra*.

B

The exemptive provision, which applies only to beneficial owners and not to other statutory insiders, must have been included in § 16 (b) for a purpose. Although the extensive legislative history of the Act is bereft of any explicit explanation of Congress' intent, see *Reliance Electric Co., supra,* at 424, the evolution of § 16 (b) from its initial proposal through passage does shed significant light on the purpose of the exemptive provision.

The original version of what would develop into the Act was S. 2693, 73d Cong., 2d Sess. (1934). It provided in § 15 (b):

> "It shall be unlawful for any director, officer, or owner of securities, owning as of record and/or beneficially more than 5 per centum of any class of stock of any issuer, any security of which is registered on a national securities exchange—
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> "(1) To purchase any such registered security with the intention or expectation of selling the same security within six months; and any profit made by such person on any transaction in such a registered security extending over a period of less than six months shall inure to and be recoverable by the issuer, irrespective of any intention or expectation on his part in entering into such transaction of holding the security purchased for a period exceeding six months."

In the next version of the legislation, H. R. 8720, 73d Cong., 2d Sess. (1934), § 15 (b) read almost identically to § 16 (b) as it was eventually enacted: [21]

> "Any profit realized by such beneficial owner,

[21] As can be seen by comparing H. R. 8720's version of § 15 (b) with § 16 (b), *supra,* n. 2, the differences are relatively minor. Formally, the statement of purpose was moved to the front of the stat-

director, or officer from any purchase and sale or sale and purchase of any such registered equity security within a period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. . . . This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale or sale and purchase of the security involved, nor any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer."

Thomas G. Corcoran, a spokesman for S. 2693's drafters, explained § 15 (b) as forbidding an insider "to carry on any short-term specu[la]tions in the stock. He cannot, with his inside information get in and out of stock within six months." Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 133 (1934). The Court of Appeals concluded that § 15 (b) of S. 2693

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ute and various grammatical changes were made. A significant substantive change not apparent from the faces of the two sections is that § 16 (b) beneficial owners are those owning more than 10% of a registered security, while H. R. 8720 retained S. 2693's 5% requirement. Compare § 16 (a) of the Act, 15 U. S. C. § 78p (a), with H. R. 8720, 73d Cong., 2d Sess., § 15 (a) (1934).

would have applied only to a beneficial owner who had that status before a purchase-sale sequence was initiated, 506 F. 2d, at 609, and we agree. Foremost appears not to contest this point. Brief for Petitioner 29. The question thus becomes whether H. R. 8720's change in the language imposing liability and its addition of the exemptive provision were intended to change S. 2693's result in a purchase-sale sequence by a beneficial owner. We think the legislative history shows no such intent.

S. 2693 and its House counterpart, H. R. 7852, 73d Cong., 2d Sess. (1934), met substantial criticism on a number of scores, including various provisions of § 15. See Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., pt. 15 (1934); Hearings on H. R. 7852 and H. R. 8720, *supra*, at 1–623.[22] S. 2693 was recast into H. R. 8720 to take account of the criticisms that the bill's drafters thought valid. Hearings on H. R. 7852 and H. R. 8720, *supra*, at 625, 674. The primary substantive criticism directed at § 15 (b) of S. 2693 was that it did not prevent the use of inside information to reap a short-term profit in a sale-repurchase situation. See Hearings on Stock Exchange Practices, *supra*, at 6557–6558. Criticism was also directed at making liability for short-term profits turn on ownership "as of record and/or beneficially." See *id.*, at 6914. H. R. 8720 remedied these perceived shortcomings by providing in § 15 (b): "Any profit realized by such beneficial

[22] Corcoran termed § 15 "one of the most important provisions in [S. 2693]." Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess., 6555 (1934). But most of the proposed legislation was directed at regulation of the stock exchanges themselves and certain trading practices that were considered undesirable regardless of who performed them. See *id.*, at 6465–6466. Most of the hearings, therefore, dealt with other problems.

owner, director, or officer from any purchase and sale or sale and purchase . . . shall inure to and be recoverable by the issuer." [23] The term "such beneficial owner" was defined in § 15 (a) to mean one "who is directly or indirectly the beneficial owner of more than 5 per centum of any class" of a registered security.

The structure of the clause imposing liability in the revised § 15 (b) did not unambiguously retain S. 2693's requirement that beneficial ownership precede a purchase-sale sequence. But we cannot assume easily that Congress intended to eliminate the requirement in the revised bill. The legislative history reveals that the requirement was made clear in the hearings, yet no complaint was made about it.

The testimony on S. 2693 demonstrates that the drafters were emphatic about the requirement. In explaining the bill Corcoran pointed out a technical flaw in S. 2693's language: "It shall be unlawful for any director, officer, or owner of securities, owning as of record and/or beneficially more than 5 per centum of any class of stock . . . ." It was possible to construe the phrase "owning . . . 5 per centum" to apply to directors and officers as well as to mere stockholders, so that trading by directors and officers would not be subject to § 15 (b) if their previous holdings did not exceed 5%. But Corcoran made clear that the requirement of pre-existing

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[23] The other major substantive change effected in § 15 (b) by H. R. 8720 was the elimination of the potential criminal liability. The criminal liability aspect of S. 2693's version of § 15 (b) received almost no attention in hearings. But cf. Hearings on Stock Exchange Practices, *supra*, at 6966. It may have been thought, however, that a criminal case could never be made out. The difficulties of proving the mental elements on which criminal liability turned had already led the drafters to eliminate those questions of fact in civil suits to recover profits. See n. 26, *infra*.

ownership of the specified percentage applied only to beneficial owners.

> "Mr. CORCORAN. . . . The bill is not very well drawn there. It ought to read to cover every director, every officer, and every stockholder who owns more than 5 percent of the stock. That is the way it was intended to read.
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> . . . . .
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> "Mr. MAPES. It ought to read 'and/or beneficially more than 5 percent' followed by 'is a director, or officer.'
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> "Mr. CORCORAN. It is badly drawn. We slipped on that. It ought to read 'every director and every officer' and then 'every big stockholder.' " Hearings on H. R. 7852 and H. R. 8720, *supra*, at 133.

See Hearings on Stock Exchange Practices, *supra*, at 6555.

The legislative record thus reveals that the drafters focused directly on the fact that S. 2693 covered a short-term purchase-sale sequence by a beneficial owner only if his status existed before the purchase, and no concern was expressed about the wisdom of this requirement. But the explicit requirement was omitted from the operative language of the section when it was restructured to cover sale-repurchase sequences. In the same draft, however, the exemptive provision was added to the section. On this record we are persuaded that the exemptive provision was intended to preserve the requirement of beneficial ownership before the purchase. Later discussions of the present § 16 (b) in the hearings are consistent with this interpretation.[24] We hold that,

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[24] "Mr. PECORA. The theory was that the ownership of 5 percent of the stock would practically constitute him an insider, and by virtue of that position he could acquire confidential information which

in a purchase-sale sequence, a beneficial owner must account for profits only if he was a beneficial owner "before the purchase." [25]

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he might use for his own enrichment by trading in the open market, against the interests of the general body of the stockholders. That is the main purpose sought to be served." Hearings on Stock Exchange Practices, *supra*, at 7741.

Ferdinand Pecora was counsel to the subcommittee of the Senate Committee on Banking and Currency that conducted extensive hearings on stock exchange operations prior to the enactment of the Act. He was also one of the draftsmen of S. 2693. Hearings on H. R. 7852 and H. R. 8720 before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., 83 (1934).

[25] In *Reliance Electric Co.* v. *Emerson Electric Co.*, 404 U. S. 418 (1972), the Court also had occasion to consider the application of the exemptive provision in a purchase-sale sequence. There Emerson acquired 13.2% of the shares of Reliance's predecessor pursuant to a tender offer and within six months disposed of its holdings in two sales of 3.24% and 9.96%. The Court of Appeals for the Eighth Circuit held that the purchase, by which Emerson became a beneficial owner, was covered by § 16 (b). But it ruled that Emerson was liable for the profits on only its first sale, because "at the time of . . . sale" of the 9.96%, it was not a beneficial owner.

The Court granted certiorari on Reliance's petition to review this construction of "at the time of . . . sale," and affirmed. The construction of "at the time of the purchase," however, was not before the Court. 404 U. S., at 420–422. Emerson thus remained liable for the 3.24% sale, although it would have had no liability under our holding today. The Court of Appeals for the Seventh Circuit has noted correctly that the construction of "at the time of . . . sale" in *Reliance Electric Co.* is superfluous in light of the construction of "at the time of the purchase" adopted by the Court of Appeals for the Ninth Circuit, which we affirm here. See *Allis-Chalmers Mfg. Co.*, 527 F. 2d, at 348 n. 12. But the procedural posture of *Reliance Electric Co.* prevented a full consideration of the meaning of the exemptive provision. See *ibid.* We express no opinion on the interpretation of the provision by which the Court of Appeals for the Seventh Circuit sought to avoid the apparent superfluity of the "at the time of . . . sale" language. *Id.*, at 348; *supra*, n. 16.

IV

Additional considerations support our reading of the legislative history.

A

Section 16 (b) imposes a strict prophylactic rule with respect to insider, short-swing trading. In *Kern County Land Co.*, 411 U. S., at 595, we noted:

> "The statute requires the [statutorily defined] inside, short-swing trader to disgorge all profits realized on all 'purchases' and 'sales' within the specified time period, without proof of actual abuse of insider information, and without proof of intent to profit on the basis of such information."

In short, this statute imposes liability without fault within its narrowly drawn limits.[26]

As noted earlier, Foremost recognizes the ambiguity of the exemptive provision, but argues that where "alter-

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[26] "Mr. CORCORAN. . . . You hold the director, irrespective of any intention or expectation to sell the security within 6 months after, because it will be absolutely impossible to prove the existence of such intention or expectation, and you have to have this crude rule of thumb, because you cannot undertake the burden of having to prove that the director intended, at the time he bought, to get out on a short swing.

"Senator GORE. You infer the intent from the fact.

"Mr. CORCORAN. From the fact.

"Senator KEAN. Suppose he got stuck in something else, and he had to sell?

"Senator BARKLEY. All he would get would be what he put into it. He would get his original investment.

"Mr. CORCORAN. He would get his money out, but the profit goes to the corporation.

"Senator KEAN. Suppose he had to sell.

"Mr. CORCORAN. Let him get out what he put in, but give the corporation the profit." Hearings on Stock Exchange Practices, *supra*, n. 22, at 6556–6557.

native constructions" of § 16 (b)'s terms are available, we should choose the construction that best serves the statute's purposes. Foremost relies on statements generally to this effect in *Kern County Land Co., supra,* at 595, and *Reliance Electric Co.,* 404 U. S., at 424. In neither of those cases, however, did the Court adopt the construction that would have imposed liability, thus recognizing that serving the congressional purpose does not require resolving every ambiguity in favor of liability under § 16 (b). We reiterate that nothing suggests that the construction urged by Foremost would serve better to further congressional purposes. Indeed, the legislative history of § 16 (b) indicates that by adding the exemptive provision Congress deliberately expressed a contrary choice. But even if the legislative record were more ambiguous, we would hesitate to adopt Foremost's construction. It is inappropriate to reach the harsh result of imposing § 16 (b)'s liability without fault on the basis of unclear language. If Congress wishes to impose such liability, we must assume it will do so expressly or by unmistakable inference.

It is not irrelevant that Congress itself limited carefully the liability imposed by § 16 (b). See *Reliance Electric Co., supra,* at 422–425. Even an insider may trade freely without incurring the statutory liability if, for example, he spaces his transactions at intervals greater than six months. When Congress has so recognized the need to limit carefully the "arbitrary and sweeping coverage" of § 16 (b), *Bershad* v. *McDonough,* 428 F. 2d 693, 696 (CA7 1970), cert. denied, 400 U. S. 992 (1971), courts should not be quick to determine that, despite an acknowledged ambiguity, Congress intended the section to cover a particular transaction.

B

Our construction of § 16 (b) also is supported by the distinction Congress recognized between short-term trading by mere stockholders and such trading by directors and officers. The legislative discourse revealed that Congress thought that all short-swing trading by directors and officers was vulnerable to abuse because of their intimate involvement in corporate affairs. But trading by mere stockholders was viewed as being subject to abuse only when the size of their holdings afforded the potential for access to corporate information.[27] These

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[27] This distinction is especially evident in the following exchange, directed to the reporting requirements imposed by § 15 (a) of S. 2693 on beneficial owners:

"Senator KEAN. Suppose a man is not a director at all and does not want to be a director, and he happens to own 5 percent or buy 5 percent. Do you think you are going to get him to file with the exchange all the time just the number of shares he has?

"Mr. CORCORAN. I think so, sir.

. . . . .

"Senator KEAN. I think it is all right to apply it to a director or officer, but I think to require the ordinary investor——

"Mr. CORCORAN. Five percent is a lot in a modern corporation. Many corporations are controlled by 5 percent or 10 percent.

"Senator KEAN. They may own it or they may sell it. This applies to all corporations, and you are getting down to the point where you are interfering with the individual a good deal there. I agree with you with respect to the officers and directors.

"Mr. CORCORAN. A stockholder owning 5 percent is as much an insider as an officer or director. Whether he is a titular director or not, he normally is, as a practical matter of fact, a director.

"Senator KEAN. He might not be." Hearings on Stock Exchange Practices, *supra*, n. 22, at 6556.

The distinction also is reflected in the discussion of the technical flaw in S. 2693. See *id.*, at 6555; Hearings on H. R. 7852 and H. R. 8720, *supra*, n. 24, at 133. See also Hearings on Stock Exchange Practices, *supra*, n. 22, at 7741–7743.

different perceptions simply reflect the realities of corporate life.

It would not be consistent with this perceived distinction to impose liability on the basis of a purchase made when the percentage of stock ownership requisite to insider status had not been acquired. To be sure, the possibility does exist that one who becomes a beneficial owner by a purchase will sell on the basis of information attained by virtue of his newly acquired holdings. But the purchase itself was not one posing dangers that Congress considered intolerable, since it was made when the purchaser owned no shares or less than the percentage deemed necessary to make one an insider.[28] Such a stockholder is more analogous to the stockholder who never owns more than 10% and thereby is excluded entirely from the operation of § 16 (b), than to a director or officer whose every purchase and sale is covered by the statute. While this reasoning might not compel our construction of the exemptive provision, it explains why Congress may have seen fit to draw the line it did. Cf. *Adler* v. *Klawans*, 267 F. 2d 840, 845 (CA2 1959).

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[28] Thus, according to the presumption of the statute, the purchaser did not have access to inside information in making the purchase. It should be noted further that as a matter of practicalities the crucial point in the acquisition of securities is not the technical "purchase," but rather the decision to make an acquisition. In the case of an acquisition of a large block of a corporation's stock, that decision may precede the "purchase" by a considerable period of time. A prudent investor will want to investigate all available information on the corporation. Such an investor also may need time to finance the purchase, and may wish to effectuate purchases without influencing the market price. These realities emphasize that the acquisition decision by a beneficial owner normally will occur well in advance of the event that is presumed to afford access to inside information.

C

Section 16 (b)'s scope, of course, is not affected by whether alternative sanctions might inhibit the abuse of inside information. Congress, however, has left some problems of the abuse of inside information to other remedies. These sanctions alleviate concern that ordinary investors are unprotected against actual abuses of inside information in transactions not covered by § 16 (b). For example, Congress has passed general antifraud statutes that proscribe fraudulent practices by insiders. See Securities Act of 1933, § 17 (a), 48 Stat. 84, 15 U. S. C. § 77q (a); Securities Exchange Act of 1934, § 10 (b), 15 U. S. C. § 78j (b); 3 Loss, *supra*, n. 11, at 1423–1429, 1442–1445. Today an investor who can show harm from the misuse of material inside information may have recourse, in particular, to § 10 (b) and Rule 10b–5, 17 CFR § 240.10b–5 (1975).[29] It also was thought that § 16 (a)'s publicity requirement [30]

[29] Rule 10b–5 has been held to embrace evils that Foremost urges its construction of § 16 (b) is necessary to prevent. The Rule has been applied to trading by one who acquired inside information in the course of negotiations with a corporation, such as the negotiations for Provident's purchase of the Foremost debentures. *Van Alstyne, Noel & Co.*, 43 S. E. C. 1080 (1969); 3 Loss, *supra*, n. 11, at 1451–1452. And a stockholder trading on information not generally known has been held subject to the sanctions of the Rule. *Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 495 F. 2d 228 (CA2 1974); *SEC* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833 (CA2 1968), cert. denied *sub nom. Coates* v. *SEC*, 394 U. S. 976 (1969). The liability of insiders who improperly "tip" others, *SEC* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (CA2), cert. denied, 404 U. S. 1005 (1971), may reduce the threat that beneficial owners not themselves represented on the board of directors will be able to acquire inside information from officers and directors. We cite these cases for illustrative purposes without necessarily implying approval.

[30] Section 16 (a), 15 U. S. C. § 78p (a), provides:

"Every person who is directly or indirectly the beneficial

would afford indirect protection against some potential misuses of inside information.[31] See Hearings on H. R. 7852 and H. R. 8720, *supra*, at 134–135; H. R. Rep. No. 1383, 73d Cong., 2d Sess., 13 (to accompany H. R. 9323, 73d Cong., 2d Sess., passed by the House, May 4, 1934, without the present § 16 (b)).

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owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l* (g) of this title, or within ten days after he becomes such beneficial owner, director, or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month."

[31] The drafters clearly thought that § 16 (a) would help deter abuses not covered by § 16 (b).

"[Mr. Corcoran.] [S]ection 15 (a), requires every director, officer, or principal holder of any securities listed on an exchange to file with the exchange and with the commission a statement of how many shares he owns and to file that statement at the end of each month to show whether there has been any change in his position during the month. That is to prevent the insider from taking advantage of information to sell or buy shares ahead of the release of information to the public about the company."

These remarks were addressed to S. 2693. Hearings on H. R. 7852 and H. R. 8720, *supra*, n. 24, at 132.

V

We must still consider briefly Foremost's contention that the "before the purchase" construction renders other enactments of Congress unnecessary and conflicts with the interpretation of § 16 (b) by the Securities and Exchange Commission.

Foremost and *amicus* Allis-Chalmers Manufacturing Co. point to §§ 16 (d) and (e) of the Act, 15 U. S. C. §§ 78p (d) and (e), as congressional actions that would not have been necessary unless one selling the securities the acquisition of which made him a beneficial owner is liable under § 16 (b). Section 16 (d), in part, exempts from § 16 (b) certain transactions by a securities "dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market." [32] Section 16 (e) provides an exemption for certain "foreign or domestic arbitrage transactions." [33] They argue similarly that the SEC's

[32] Section 16 (d), 15 U. S. C. § 78p (d), provides:

"The provisions of subsection (b) of this section shall not apply to any purchase and sale, or sale and purchase, and the provisions of subsection (c) of this section shall not apply to any sale, of an equity security not then or theretofore held by him in an investment account, by a dealer in the ordinary course of his business and incident to the establishment or maintenance by him of a primary or secondary market (otherwise than on a national securities exchange or an exchange exempted from registration under section 78e of this title) for such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest, define and prescribe terms and conditions with respect to securities held in an investment account and transactions made in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market."

"Dealer" is defined in § 3 (a) (5) of the Act, 15 U. S. C. § 78c (a) (5).

[33] Section 16 (e), 15 U. S. C. § 78p (e), provides:

"The provisions of this section shall not apply to foreign or domestic arbitrage transactions unless made in contravention of

Rule 16b–2, 17 CFR § 240.16b–2 (1975), is unnecessary if our construction of § 16 (b) is correct. Rule 16b–2 exempts from § 16 (b) specified transactions "in connection with the distribution of a substantial block of securities." [34]

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such rules and regulations as the Commission may adopt in order to carry out the purposes of this section."

[34] Section 16 (b) provides in its final clause that it shall not cover "any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p (b). Rule 16b–2, 17 CFR § 240.16b–2 (1975), provides:

"(a) Any transaction of purchase and sale, or sale and purchase, of a security which is effected in connection with the distribution of a substantial block of securities shall be exempt from the provisions of section 16 (b) of the Act, to the extent specified in this § 240.16b–2, as not comprehended within the purpose of said section, upon the following conditions:

"(1) The person effecting the transaction is engaged in the business of distributing securities and is participating in good faith, in the ordinary course of such business, in the distribution of such block of securities;

"(2) The security involved in the transaction is (i) a part of such block of securities and is acquired by the person effecting the transaction, with a view to the distribution thereof, from the issuer or other person on whose behalf such securities are being distributed or from a person who is participating in good faith in the distribution of such block of securities, or (ii) a security purchased in good faith by or for the account of the person effecting the transaction for the purpose of stabilizing the market price of securities of the class being distributed or to cover an over-allotment or other short position created in connection with such distribution; and

"(3) Other persons not within the purview of section 16 (b) of the Act are participating in the distribution of such block of securities on terms at least as favorable as those on which such person is participating and to an extent at least equal to the aggregate participation of all persons exempted from the provisions of section 16 (b) of the Act by this § 240.16b–2. However, the performance of the functions of manager of a distributing group and the receipt

We do not consider these provisions to be inconsistent with our holding. Nothing on their faces would make them applicable to one selling the securities the purchase of which made him a beneficial owner. But the exemptions would be necessary to protect stockholders already qualifying as beneficial owners when they purchased [35] and they would, of course, apply to transactions by directors and officers as well.

Foremost and the *amicus* also remind us that the interpretation of the exemptive provision for which they contend has been adopted by the SEC in the past. See Brief for SEC as *Amicus Curiae* in *Reliance Electric Co.* v. *Emerson Electric Co.*, O. T. 1971, No. 70–79, pp. 22–27. But the Commission has not appeared as an *amicus* in this case. In any event, even if the Commission's views have not changed we would not afford them the deference to which the views of the agency administering a statute are usually entitled, for in *Reliance Electric Co.*, 404 U. S., at 425–427, the Court rejected the basic theory on which the SEC based its interpretation

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of a bona fide payment for performing such functions shall not preclude an exemption which would otherwise be available under this § 240.16b–2.

"(b) The exemption of a transaction pursuant to this § 240.16b–2 with respect to the participation therein of one party thereto shall not render such transaction exempt with respect to participation of any other party therein unless such other party also meets the conditions of this § 240.16b–2."

[35] The press release accompanying the SEC's initial promulgation of Rule 16b–2 demonstrates this point. It explained: "The new Rule [16b–2] affords an exemption for certain cases by providing that underwriters who happen to have a member of their firm also an officer or director of the issuer or one of its principal stockholders who are regularly engaged in the business of buying and selling securities need not account to the company for profits realized from purchases and sales made in the distribution of a security for the company . . . ." SEC Release No. 34–264 (June 8, 1935).

of the exemptive provision. Our re-examination of the exemptive provision confirms the view that the SEC's theory did not reflect the intent of Congress.

The judgment is

Affirmed.

MR. JUSTICE WHITE joins in the judgment of the Court, and in all but Part IV–C of the Court's opinion.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Syllabus

MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* WEBER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–850. Argued November 4, 1975—Decided January 14, 1976

In addition to authorizing United States magistrates to perform certain specified statutory functions, the Federal Magistrates Act (Act) authorizes district courts to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U. S. C. § 636 (b). Pursuant to that provision, the District Court adopted General Order No. 104–D, which, *inter alia*, requires initial reference to a magistrate of actions to review administrative determinations regarding entitlement to Social Security benefits, including Medicare. Respondent challenged the final determination of the Secretary of Health, Education, and Welfare that respondent was not entitled to claimed Medicare benefits. Under 42 U. S. C. § 405 (g) a district court can review such a determination only on the basis of the pleadings and administrative record, and the court is bound by the Secretary's factual findings if supported by substantial evidence. The case was assigned to a District Judge and at the same time referred to a Magistrate to "prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate" for consideration by the District Judge after the Magistrate had reviewed the record and heard the parties' arguments. Contending that the reference to the Magistrate under the District Court's general order violated Fed. Rule Civ. Proc. 53 (b) and was not authorized by the Act, the Secretary moved to vacate the order of reference. The District Court refused to vacate the reference order. The Court of Appeals affirmed. *Held:* In the context of this case, the preliminary-review function assigned to the Magistrate was one of the "additional duties" that the Act contemplates magistrates are to perform. Pp. 266–275.

(a) Section 636 (b) was enacted to permit district courts to increase the scope of responsibilities that magistrates can undertake upon reference, as part of its plan "to establish a system

capable of increasing the overall efficiency of the Federal judiciary." But Congress also intended that in such references the district judge retain ultimate responsibility for decisionmaking. Pp. 266–270.

(b) In this type of case the magistrate helps the court focus on the relevant portions of what might be a voluminous record and move directly to any substantial legal arguments, by putting before the court a preliminary evaluation of the evidence in the record. Although substantially assisting the court, the magistrate performs only a preliminary review of a closed administrative record, and any recommendation to the court is confined to whether or not substantial evidence supports the Secretary's decision. The final determination remains with the judge, who has discretion to review the record anew. Pp. 270–272.

(c) The order of reference here does not constitute the magistrate a special master and there is no conflict with the requirement of Fed. Rule Civ. Proc. 53 (b) that "reference to a master shall be the exception and not the rule," made in nonjury cases "only upon a showing that some exceptional condition requires it." The magistrate here acts in an advisory role as a magistrate, not as a master; the judge is free to accept or reject the magistrate's recommendation in whole or in part, whereas under Rule 53 (e) the court must accept a special master's finding of fact if it is not clearly erroneous. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249, distinguished. Pp. 272–275.

503 F. 2d 1049, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined, except STEVENS, J., who took no part in the consideration or decision of the case.

Michael Kimmel argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Lee, Deputy Solicitor General Friedman, Gerald P. Norton,* and *Morton Hollander.* On the reply brief was *Solicitor General Bork.*

Peter D. Ehrenhaft, by invitation of the Court, 421 U. S. 985, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented in this case is whether the Federal Magistrates Act, 28 U. S. C. § 631 *et seq.*, permits a United States district court to refer all Social Security benefit cases to United States magistrates for preliminary review of the administrative record, oral argument, and preparation of a recommended decision as to whether the record contains substantial evidence to support the administrative determination—all subject to an independent decision, on the record, by the district judge who may, in his discretion, hear the whole matter anew.

(1)

Respondent Weber brought this action in the United States District Court for the Central District of California to challenge the final determination of the Secretary of Health, Education, and Welfare that he was not entitled to reimbursement under the Medicare provisions of the Social Security Act, as added, 79 Stat. 291, and amended, 42 U. S. C. § 1395 *et seq.*, for medical payments he made on behalf of his wife. Such a suit for judicial review is authorized by § 205 (g) of the Federal Magistrates Act, as added, 53 Stat. 1370, and amended, 42 U. S. C. § 405 (g), and governed by its standards. The court may consider only the pleadings and administrative record, and must accept the Secretary's findings of fact so long as they are supported by substantial evidence.

When respondent's complaint was filed, the Clerk of the court pursuant to court rule assigned the case to a named District Judge, and simultaneously referred it to a United States Magistrate with directions "to notice and conduct such factual hearings and legal argument as may be appropriate" and to "prepare a proposed written order or decision, together with proposed findings of fact and

conclusions of law where necessary or appropriate" for consideration by the District Judge. The Clerk took these steps pursuant to General Order No. 104–D of the District Court, which requires initial reference to a magistrate in seven categories of review of administrative cases,[1] including actions filed under 42 U. S. C. § 405 (g).

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[1] General Order No. 104–D provides for reference in the following types of review of administrative cases:

"(A) Actions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U. S. C. § 405 (g).

"(B) Actions filed by the United States or a carrier to review, implement or restrain orders of the Interstate Commerce Commission re freight overcharges, including but not limited to actions under 28 U. S. C. § 1336 and 49 U. S. C. § 304a.

"(C) Actions, whether in the form of judicial review, habeas corpus or otherwise, for review of orders and other actions of the Immigration and Naturalization Service. Included, but not by way of limitation, are actions involving deportation orders, denial of preference classification visas and denial of petitions to adjust status.

"(D) Actions for review of adjudications by the Civil Service Commission, or the various departments or agencies, involving personnel actions such as wrongful discharge, reductions in force, transfers, retirements, etc.

"(E) Actions for review of an order of any branch or establishment of the military service denying discharge of petitioner from the military, whether such actions are brought in the form of petitions for judicial review, habeas corpus or actions for declaratory relief and injunction.

"(F) Actions filed pursuant to 18 U. S. C. § 923 (f) (3) to review administrative decisions denying applications for licenses to engage in business as a firearms or ammunition importer, manufacturer or dealer.

"(G) Actions to review administrative decisions by the Department of Labor denying applications for alien employment certification required pursuant to the provisions of 8 U. S. C. § 1182 (a) (14)."

The petition for certiorari raises only the issue of the propriety of the part of subsection (A) of the General Order that authorizes

The parties may object to the magistrate's recommendations. After acting on any objections the magistrate is to forward the entire file to the district judge to whom the case is assigned for decision; the district judge "will calendar the matter for oral argument before him if he deems it necessary or appropriate."

The Secretary moved to vacate the order of reference, arguing (1) that referral under a general order of this type violated Fed. Rule Civ. Proc. 53 (b) and (2) that such referral was not authorized by the Federal Magistrates Act. The Secretary also argued that the reference was of doubtful constitutionality and in contravention of the judicial review provisions of the Social Security Act, arguments that he has expressly declined to make in this Court. The District Court refused to vacate the order of reference, but certified the reference question for appeal under 28 U. S. C. § 1292 (b).

The Court of Appeals affirmed. 503 F. 2d 1049 (CA9 1974). That court stressed the limited and preliminary nature of the inquiry in review actions brought under 42 U. S. C. § 405 (g), the limited scope of the Magistrate's role on reference, and the fact that final authority for decision remained with the District Judge. "Were the broad provisions of General Order No. 104–D . . . before us, the Secretary might have grounds to complain. As applied, the rule is not vulnerable to the attack here mounted." 503 F. 2d, at 1051. The Court of Appeals thus reached a decision squarely in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Ingram* v. *Richardson*, 471 F. 2d 1268 (1972). We granted certiorari, 420 U. S. 989 (1975),[2] and we affirm.

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reference of cases brought under 42 U. S. C. § 405 (g), and we intimate no opinion on the validity of its other provisions.

[2] Because respondent has declined to appear, we invited an *amicus curiae* to support the decision of the Court of Appeals. 421 U. S. 985 (1975).

(2)

After several years of study, the Congress in 1968 enacted the Federal Magistrates Act, 28 U. S. C. § 631 *et seq.* The Act abolished the office of United States commissioner, and sought to "reform the first echelon of the Federal judiciary into an effective component of a modern scheme of justice by establishing a system of U. S. magistrates." S. Rep. No. 371, 90th Cong., 1st Sess., 8 (1967) (hereafter Senate Report). In order to improve the former system and to attract the most competent men and women to the office, the Act in essence made the position analogous to the career service, replacing the fee system of compensation with substantial salaries; the Act also gave both full- and part-time magistrates a definite term of office, and required that wherever possible the district courts appoint only members of the bar to serve as magistrates. Magistrates took over most of the duties of the commissioners, and the Act gave them new authority to try a broad range of misdemeanors with the consent of the parties.

Title 28 U. S. C. § 636 (b) outlines a procedure by which the district courts may call upon magistrates to perform other functions, in both civil and criminal cases. It provides:

> "Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

"(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

"(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

"(3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing."

The three examples § 636 (b) sets out are, as the statute itself states, not exclusive. The Senate sponsor of the legislation, Senator Tydings, testified in the House hearings:

"The Magistrate[s] Act specifies these three areas because they came up in our hearings and we thought they were areas in which the district courts might be able to benefit from the magistrate's services. We did not limit the courts to the areas mentioned. Nor did we require that they use the magistrates for additional functions at all.

"We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U. S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts." Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess., 81 (1968) (hereafter House Hearings).

See also Hearings on the Federal Magistrates Act before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th

Cong., 2d Sess., and 90th Cong., 1st Sess., 14, 27 (1966 and 1967) (hereafter Senate Hearings).

Section 636 (b) was included to "permit . . . the U. S. district courts to assign magistrates, as officers of the courts, a variety of functions . . . presently performable only by the judges themselves." Senate Report 12. In enacting this section and in expanding the criminal jurisdiction conferred upon magistrates, Congress hoped by "increasing the scope of the responsibilities that can be discharged by that office, . . . to establish a system capable of increasing the overall efficiency of the Federal judiciary . . . ." *Id.*, at 11.

The Act grew from Congress' recognition that a multitude of new statutes and regulations had created an avalanche of additional work for the district courts which could be performed only by multiplying the number of judges or giving judges additional assistance. The Secretary argues that Congress intended the transfer to magistrates of simply the irksome, ministerial tasks; respondent [3] urges that Congress intended magistrates to take on a wide range of substantive judicial duties and advisory functions. We need not accept the characterization of the federal magistrate as either a "para-judge," as respondent would have it, or a "supernotary," as the Secretary argues, in order to resolve this case; finding the best analogy to this new office is not particularly important. Congress had a number of precedents for this new officer before it: British masters, justices of peace, and magistrates; our own traditional special masters in equity; and pretrial examiners.[4] The

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[3] For convenience, the position taken by *amicus* in support of the Court of Appeals' judgment will be referred to as the position of respondent.

[4] The administration of the Act also profits from the British analogy. See Institute of Judicial Administration, Report of the

office Congress created drew on all prior experience. What is important is that the congressional anticipation is becoming a reality; in fiscal 1975, for example, the 500 full- or part-time United States magistrates disposed of 255,061 matters, most of which would otherwise have occupied district judges. These included 36,766 civil proceedings, 537 of which were Social Security review cases. Annual Report of the Director, Administrative Office of the United States Courts VIII–4 (1975). See also Sussman, The Fourth Tier in the Federal Judicial System: The United States Magistrate, 56 Chicago Bar Record 134 (1974); Geffen, Practice Before the United States Magistrate, 47 L. A. Bar Bull. 462 (1972); Doyle, Implementing the Federal Magistrates Act, 39 J. Kan. Bar Assn. 25 (1970).

Congress manifested concern as well as enthusiasm, however, in considering the Act. Several witnesses, including the Director of the Administrative Office and representatives of the Justice Department, expressed some fear that Congress might improperly delegate to magistrates duties reserved by the Constitution to Article III judges. Senate Hearings 107–128, 241n; House Hearings 123–128.[5] The hearings and committee

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Committee to Study the Role of Masters in the English Judicial System (Federal Judicial Center 1974).

[5] Some courts have manifested a like concern. See *TPO, Inc.* v. *McMillen*, 460 F. 2d 348 (CA7 1972); *Reed* v. *Board of Election Comm'rs*, 459 F. 2d 121 (CA1 1972). But cf. *Palmore* v. *United States*, 411 U. S. 389 (1973). See also Note, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975); Comment, An Adjudicative Role for Federal Magistrates in Civil Cases, 40 U. Chi. L. Rev. 584 (1973). Because we limit our consideration of the Act and General Order No. 104–D to the particular reference presented by this case, we need not deal with these broad constitutional issues. Petitioner expressly declines to rely on any constitutional argument.

reports indicate that in § 636 (b) Congress met this problem in two ways. First, Congress restricted the range of matters that may be referred to a magistrate to those where referral is "not inconsistent with the Constitution and laws of the United States . . . ." Second, Congress limited the magistrate's role in cases referred to him under § 636 (b). The Act's sponsors made it quite clear that the magistrate acts "under the supervision of the district judges" when he accepts a referral, and that authority for making final decisions remains at all times with the district judge. Senate Report 12. "[A] district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction." House Hearings 73 (testimony of Sen. Tydings). See also *id.*, at 127 (testimony of Asst. Deputy Atty. Gen. Finley).

(3)

We need not define the full reach of a magistrate's authority under the Act, or reach the broad provisions of General Order No. 104–D, in order to decide this case. Under the part of the order at issue the magistrates perform a limited function which falls well within the range of duties Congress empowered the district courts to assign to them. The magistrate is directed to conduct a preliminary review of a closed administrative record—closed because under § 205 (g) of the Social Security Act, 42 U. S. C. § 405 (g), neither party may put any additional evidence before the district court. The magistrate gives only a recommendation to the judge, and only on the single, narrow issue: is there in the record substantial evidence to support the Secretary's decision?[6] The magistrate may do no more than pro-

[6] Ordinarily, the parties will agree as to the legal standard, leaving as the sole issue whether the Secretary's determination is sup-

pose a recommendation, and neither § 636 (b) nor the General Order gives such recommendation presumptive weight. The district judge is free to follow it or wholly to ignore it, or, if he is not satisfied, he may conduct the review in whole or in part anew. The authority—and the responsibility—to make an informed, final determination, we emphasize, remains with the judge.

The magistrate's limited role in this type of case nonetheless substantially assists the district judge in the performance of his judicial function, and benefits both him and the parties. A magistrate's review helps focus the court's attention on the relevant portions of what may be a voluminous record, from a point of view as neutral as that of an Article III judge. Review also helps the court move directly to those legal arguments made by the parties that find some support in the record. Finally, the magistrate's report puts before the district judge a preliminary evaluation of the cumulative effect of the evidence in the record, to which the parties may address argument, and in this way narrows the dispute. Each step of the process takes place with the full participation of the parties. They know precisely what recommendations the judge is receiving and may frame their arguments accordingly.

We conclude that in the context of this case the preliminary-review function assigned to the magistrate, and

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ported by substantial evidence. In some cases, the magistrate may preliminarily resolve issues of law before making a recommendation; in some few cases, the recommendation may turn wholly upon an issue of law. The parties have not suggested that cases in either of these subcategories raise issues of statutory interpretation that require separate treatment, and we do not reach them on this record. Experience with the magistrate's role under the Act may well lead to the conclusion that sound judicial administration calls for sending directly to the district judge those cases that turn solely upon issues of law.

at issue here, is one of the "additional duties" that the statute contemplates magistrates are to perform.[7]

(4)

The Secretary argues that the magistrate, in taking this reference, functions as a special master. From this premise, the Secretary asks us to hold that a general rule requiring automatic reference in a category of cases does not comply with the mandate of Fed. Rule Civ. Proc. 53 (b) that "reference to a master shall be the exception and not the rule," made in nonjury cases "only upon a showing that some exceptional condition requires it." He also argues that, for similar reasons, the reference here is

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[7] Though we do not rely upon subsequently expressed congressional views, the Congress plainly considers claims such as respondent brought in the District Court as matters that could appropriately be referred for preliminary review to a magistrate. In considering magistrates' salaries in 1972, a Senate subcommittee noted:

"Magistrates are judicial officers of the Federal district courts. . . . They may also be authorized to screen prisoner petitions, hold pretrial conferences in civil and criminal cases, hear certain preliminary motions, *review social security appeals*, review Narcotics Addict Rehabilitation Act matters, and serve as special masters. In short, they render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases." S. Rep. No. 92–1065, p. 3 (1972) (emphasis added).

The Administrative Office of the United States Courts, the statutory body that supervises the administrative aspects of the Act pursuant to 28 U. S. C. § 604 (d) (1), reads the Act in the same way. It has distributed a "checklist" of magistrate duties that includes review of Social Security appeals brought under 42 U. S. C. § 405 (g). Judicial Conference of the United States, Committee on the Administration of the Federal Magistrates System, Duties Which Might Be Assigned to U. S. Magistrates (Mar. 14, 1975). The Administrative Office first noted in its 1972 report that district courts were assigning Social Security appeals to magistrates under the 1968 Act. Administrative Office of the U. S. Courts, Annual Report of the Director VI–8 (1972).

not permissible under our decision in *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 (1957).[8]

Section 636 (b) expressly provides that a district court may, in an appropriate case and in accordance with Fed. Rule Civ. Proc. 53, call upon a magistrate to act as a special master. But the statute also is clear that not every reference, for whatever purpose, is to be characterized as a reference to a special master. It treats references to the magistrate acting as master quite separately in subsection (1), indicating by its structure that other references are of a different sort. Moreover, Rule 53 (e) provides that, in nonjury cases referred to a master, the court shall accept any finding of fact that is not clearly erroneous. Under the reference in this case, however, the judge remains free to give the magistrate's recommendation whatever weight the judge decides it merits. It cannot be said, therefore, that the magistrate acts as a special master in the sense that either Rule 53 or the Federal Magistrates Act uses that term. The order of reference at issue does not constitute the magistrate a special master.

The Secretary argues that the magistrate will be a master in fact because the judge will accept automatically the recommendation made in every case. Nothing

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[8] These arguments persuaded the Court of Appeals in *Ingram* v. *Richardson*, 471 F. 2d 1268 (CA6 1972). Other federal courts to consider the issue reached a contrary result. *Yascavage* v. *Weinberger*, 379 F. Supp. 1297 (MD Pa. 1974); *Bell* v. *Weinberger*, 378 F. Supp. 198 (ND Ga. 1974); *Murphy* v. *Weinberger* [Oct. 1966–Dec. 1974 Transfer Binder] CCH Unempl. Ins. Rep. ¶ 17,608 (Conn. 1974).

Several courts have relied upon these arguments to one extent or another in disapproving references that involved a broader grant of authority to the magistrate. See, *e. g.*, *Flowers* v. *Crouch-Walker Corp.*, 507 F. 2d 1378 (CA7 1974); *TPO, Inc.* v. *McMillen*, 460 F. 2d 348 (CA7 1972); *Reed* v. *Board of Election Comm'rs*, 459 F. 2d 121 (CA1 1972).

in the record or within the scope of permissible judicial notice supports this argument; nor does common observation of the performance of United States judges remotely lend the slightest credence to such an extravagant assertion. We express no opinion with respect to either the wisdom or the validity of automatic referral in other types of cases; only the narrow portion of General Order No. 104–D that led to reference of this particular case is before us today. In this narrow range of cases, reference promotes more focused, and so more careful, decisionmaking by the district judge. We categorically reject the suggestion that judges will accept, uncritically, recommendations of magistrates.

Our decision in *La Buy* v. *Howes Leather Co., supra,* does not call for a different result. In *La Buy,* the District Judge on his own motion referred to a special master two complex, protracted antitrust cases on the eve of trial. The cases had been pending before him for several years, he had heard pretrial motions, and he was familiar with the issues involved. The master, a member of the bar, was to hear and decide the entire case, subject to review by the District Judge under the "clearly erroneous" test. The judge cited the problems attendant to docket congestion to satisfy Rule 53's requirement that a reference to a special master be justified by "exceptional circumstances." The Court held that on these facts reference was not permissible and affirmed the Court of Appeals' supervisory prohibition.

La Buy, although nearly two decades past, is the most recent of our cases dealing with special masters, and our decision today does not erode it.[9] The Magistrate here acted in his capacity as magistrate, not as a spe-

[9] See generally Kaufman, Masters in the Federal Courts: Rule 53, 58 Col. L. Rev. 452 (1958); *CAB* v. *Carefree Travel, Inc.,* 513 F. 2d 375 (CA2 1975).

cial master, under a reference authorized by an Act passed 10 years after *La Buy* was decided. Other factors distinguish this case from *La Buy* as well. The issues here are as simple as they were complex in *La Buy*, and the District Judge had not yet invested any time in familiarizing himself with the case. The reference in this case will result in a recommendation that carries only such weight as its merit commands and the sound discretion of the judge warrants. We are persuaded that the important premises from which the *La Buy* decision proceeded are not threatened here.

Finally, our decision in *Wingo* v. *Wedding*, 418 U. S. 461 (1974), does not bear on this case. The Secretary has abandoned any claim that the statute giving the District Court jurisdiction of the case in the first instance, 42 U. S. C. § 405 (g), precludes reference to a magistrate. It was the Court's reading of the habeas corpus statute, 28 U. S. C. § 2243, that formed the basis for the holding in *Wingo* v. *Wedding*.

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MICHELIN TIRE CORP. *v.* WAGES, TAX COMMISSIONER, ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 74–1396. Argued October 15, 1975—Decided January 14, 1976

Georgia's assessment of a nondiscriminatory ad valorem property tax against petitioner's inventory of imported tires maintained at its wholesale distribution warehouse in the State *held* not to be within the Import-Export Clause's prohibition against States laying "any Imposts or Duties on Imports." *Low* v. *Austin*, 13 Wall. 29, overruled. Pp. 281–302.

(a) In the history of the Import-Export Clause, whose purposes were to commit to the Federal Government the exclusive power to regulate foreign commerce and the exclusive right to all revenues from imposts and duties on imports, and to assure the free flow of imported goods among the States by prohibiting the taxing of goods merely flowing through seaboard States to other States, there is nothing to suggest that a nondiscriminatory ad valorem property tax imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution. Pp. 283–286.

(b) Such nondiscriminatory property taxation cannot affect the Federal Government's exclusive regulation of foreign commerce, since such a tax does not fall on imports as such because of their place of origin and it cannot be used to create special protective tariffs or particular preferences for certain domestic goods or be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation. P. 286.

(c) Nor will such taxation deprive the Federal Government of its exclusive right to all revenues from imposts and duties on imports, since that right by definition only extends to revenues from exactions of a particular category. Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth, and there is no reason why an importer should not share

these costs with his competitors handling domestic goods. Pp. 286–288.

(d) Nor does such nondiscriminatory property taxation interfere with the free flow of imported goods among the States. Importers of goods destined for inland States can easily avoid such taxes by using modern transportation methods, and to the extent such taxation may increase the cost of goods purchased by "inland" consumers, the cost, which is the *quid pro quo* for benefits actually conferred by the taxing State, is one that ultimate consumers should pay for. The prevention of exactions that are no more than transit fees that could otherwise be imposed due to the peculiar geographical situation of certain States may be secured by prohibiting the assessment of even nondiscriminatory property taxes on goods that are still in import transit. Pp. 288–290.

(e) The Import-Export Clause, while not in terms excepting nondiscriminatory taxes with some impact on imports or exports, is not couched in terms of a broad prohibition of every "tax," but only prohibits States from laying "Imposts or Duties," which historically connoted exactions directed only at imports or commercial activity as such. Pp. 290–293.

(f) Since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead to a condemnation of such taxation, and the Clause's terminology—"Imposts or Duties"—is sufficiently ambiguous as not to warrant a presumption that it was intended to embrace taxation that does not create the evils the Clause was specifically intended to eliminate. Pp. 293–294.

233 Ga. 712, 214 S. E. 2d 349, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 302. STEVENS, J., took no part in the consideration or decision of the case.

Earle B. May, Jr., argued the cause for petitioner. With him on the brief were *F. M. Bird, Edward R. Kane,* and *E. A. Dominianni.*

Hosea Alexander Stephens, Jr., argued the cause for

respondents. With him on the brief was *Homer M. Stark.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Respondents, the Tax Commissioner and Tax Assessors of Gwinnett County, Ga., assessed ad valorem property taxes against tires and tubes imported by petitioner from France and Nova Scotia that were included on the assessment dates in an inventory maintained at its wholesale distribution warehouse in the county. Petitioner brought this action for declaratory and injunctive relief in the Superior Court of Gwinnett County, alleging that with the exception of certain passenger tubes that had been removed from the original shipping cartons,[1] the ad valorem property taxes assessed against

**Curt T. Schneider*, Attorney General, and *Jonathan P. Small* and *Clarence J. Malone*, Assistant Attorneys General, filed a brief for the State of Kansas et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed by *Arthur K. Bolton*, Attorney General, *Robert S. Stubbs II*, Chief Deputy Attorney General, *Richard L. Chambers*, Deputy Attorney General, *H. Perry Michael*, Senior Assistant Attorney General, and *David A. Runnion*, Assistant Attorney General, for the State of Georgia; by *William J. Brown*, Attorney General, and *John C. Duffy, Jr.*, Assistant Attorney General, for the Tax Commissioner of Ohio; and by *John H. Larson*, *James Dexter Clark*, *Jonathan Day*, *Leonard Putnam*, *Richard W. Marston*, *Richard J. Moore*, *Robert M. Wash*, *Douglas J. Maloney*, *Adrian Kuyper*, *Ray T. Sullivan, Jr.*, *John B. Heinrich*, *William Sabourin*, *George P. Kading*, *William M. Siegel*, *Byron D. Athan*, *Robert A. Rehberg*, *Thomas B. Sawyer*, *Calvin E. Baldwin*, *Charles R. Mack*, *Joseph Kase, Jr.*, *Thomas M. O'Connor*, and *John J. Doherty* for the county of Los Angeles, California, et al.

[1] Petitioner's complaint conceded the taxability of certain passenger tubes that had been removed from the original shipping cartons. These had a value of $633.92 on the assessment date January 1, 1972, and of $664.22 on the assessment date January 1, 1973. The tax for 1972 on the tubes was $8.03 and for 1973 was $8.73.

its inventory of imported tires and tubes were prohibited by Art. I, § 10, cl. 2, of the Constitution, which provides in pertinent part: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws . . . ." After trial, the Superior Court granted the requested declaratory and injunctive relief. On appeal, the Supreme Court of Georgia affirmed in part and reversed in part, agreeing that the tubes in the corrugated shipping cartons were immune from ad valorem taxation, but holding that the tires had lost their status as imports and had become subject to such taxation because they had been mingled with other tires imported in bulk, sorted, and arranged for sale. 233 Ga. 712, 214 S. E. 2d 349 (1975). We granted certiorari, 422 U. S. 1040 (1975). The only question presented is whether the Georgia Supreme Court was correct in holding that the tires were subject to the ad valorem property tax.[2] We affirm without addressing the question whether the Georgia Supreme Court was correct in holding that the tires had lost their status as imports. We hold that, in any event, Georgia's assessment of a nondiscriminatory ad valorem property tax against the imported tires is not within the constitutional prohibition against laying "any Imposts or Duties on Imports . . ." and that insofar as *Low* v. *Austin*, 13 Wall. 29 (1872) is to the contrary, that decision is overruled.

I

Petitioner, a New York corporation qualified to do business in Georgia, operates as an importer and whole-

[2] The respondents did not cross-petition from the affirmance of the holding of the Superior Court that the tubes in the corrugated shipping cartons were immune from the tax, and that holding is therefore not before us for review.

sale distributor in the United States of automobile and truck tires and tubes manufactured in France and Nova Scotia by Michelin Tires, Ltd. The business is operated from distribution warehouses in various parts of the country. Distribution and sale of tires and tubes from the Gwinnett County warehouse is limited to the 250–300 franchised dealers with whom petitioner does all of its business in six southeastern States. Some 25% of the tires and tubes are manufactured in and imported from Nova Scotia, and are brought to the United States in tractor-driven, over-the-road trailers packed and sealed at the Nova Scotia factory. The remaining 75% of the imported tires and tubes are brought to the United States by sea from France and Nova Scotia in sea vans packed and sealed at the foreign factories. Sea vans are essentially over-the-road trailers from which the wheels are removed before being loaded aboard ship. Upon arrival of the ship at the United States port of entry, the vans are unloaded, the wheels are replaced, and the vans are tractor-hauled to petitioner's distribution warehouse after clearing customs upon payment of a 4% import duty.

The imported tires, each of which has its own serial number, are packed in bulk into the trailers and vans, without otherwise being packaged or bundled. They lose their identity as a unit, however, when unloaded from the trailers and vans at the distribution warehouse. When unloaded they are sorted by size and style, without segregation by place of manufacture, stacked on wooden pallets each bearing four stacks of five tires of the same size and style, and stored in pallet stacks of three pallets each. This is the only processing required or performed to ready the tires for sale and delivery to the franchised dealers.

Sales of tires and tubes from the Gwinnett County

distribution warehouse to the franchised dealers average 4,000–5,000 pounds per sale. Orders are filled without regard to the shipments in which the tires and tubes arrived in the United States or the place of their manufacture. Delivery to the franchised dealers is by common carrier or customer pickup.

II

Both Georgia courts addressed the question whether, without regard to whether the imported tires had lost their character as imports, Georgia's nondiscriminatory ad valorem tax fell within the constitutional prohibition against the laying by States of "any Imposts or Duties on Imports . . . ." The Superior Court expressed strong doubts that the ad valorem tax fell within the prohibition but concluded that it was bound by this Court's decisions to the contrary. The Superior Court stated:

> "While it would seem that where said tires and tubes have been placed in [petitioner's] general inventory for the purpose of sale to its customers, . . . such inventory should be taxed to the same extent as any other inventory of any other business in Gwinnett County, and the Court would so hold if supported by the law, it is clear that where the property is imported for resale it retains its import exemption from ad valorem taxes until after such sale," "[for] [t]he immunity of imported goods from local taxation includes immunity from local ad valorem property taxes; *Hooven & Allison Company* v. *Evatt,* 324 U. S. 652; *Low* v. *Austin,* 80 U. S. 29." Pet. for Cert., App. A–4, A–3.

Similarly, the Georgia Supreme Court stated, 233 Ga., at 722, 214 S. E. 2d, at 355:

> "[Petitioners] argue that an annual ad valorem tax is not a tax on imports within the meaning of

the federal constitutional provision. We reject this argument on the basis of the above-cited authority. [*E. g., Low* v. *Austin.*]"

Low v. *Austin, supra,* is the leading decision of this Court holding that the States are prohibited by the Import-Export Clause from imposing a nondiscriminatory ad valorem property tax on imported goods until they lose their character as imports and become incorporated into the mass of property in the State. The Court there reviewed a decision of the California Supreme Court that had sustained the constitutionality of California's nondiscriminatory ad valorem tax on the ground that the Import-Export Clause only prohibited taxes upon the character of the goods as imports and therefore did not prohibit nondiscriminatory taxes upon the goods as property. See 13 Wall., at 30–31. This Court reversed on its reading of the seminal opinion construing the Import-Export Clause, *Brown* v. *Maryland,* 12 Wheat. 419 (1827), as holding that "[w]hilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition." 13 Wall., at 34.

Scholarly analysis has been uniformly critical of *Low* v. *Austin.* It is true that Mr. Chief Justice Marshall, speaking for the Court in *Brown* v. *Maryland, supra,* at 442, said that "while [the thing imported remains] the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." Commentators have uniformly agreed that *Low* v. *Austin* misread this dictum in holding that the Court in *Brown* included nondiscriminatory ad valorem property taxes among prohibited "imposts" or "duties," for the contrary conclusion is plainly to be inferred from consideration of the specific abuses which led the Framers to include the Import-

Export Clause in the Constitution. See, *e. g.*, Powell, State Taxation of Imports—When Does an Import Cease to Be an Import?, 58 Harv. L. Rev. 858 (1945); Note, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 126, 176 (1959); Early & Weitzman, A Century of Dissent: The Immunity of Goods Imported for Resale From Nondiscriminatory State Personal Property Taxes, 7 Sw. U. L. Rev. 247 (1975); Dakin, The Protective Cloak of the Export-Import Clause: Immunity for the Goods or Immunity for the Process?, 19 La. L. Rev. 747 (1959).

Our independent study persuades us that a nondiscriminatory ad valorem property tax is not the type of state exaction which the Framers of the Constitution or the Court in *Brown* had in mind as being an "impost" or "duty" and that *Low* v. *Austin*'s reliance upon the *Brown* dictum to reach the contrary conclusion was misplaced.

III

One of the major defects of the Articles of Confederation, and a compelling reason for the calling of the Constitutional Convention of 1787, was the fact that the Articles essentially left the individual States free to burden commerce both among themselves and with foreign countries very much as they pleased. Before 1787 it was commonplace for seaboard States with port facilities to derive revenue to defray the costs of state and local governments by imposing taxes on imported goods destined for customers in other States. At the same time, there was no secure source of revenue for the central government. James Madison, in his Preface to Debates in the Convention of 1787, 3 M. Farrand, The Records of the Federal Convention of 1787, p. 542 (1911) (hereafter Farrand), provides a graphic description of the situation:

> "The other source of dissatisfaction was the peculiar situation of some of the States, which having no

> convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on. New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms. The Articles of Confederation provided no remedy for the complaint: which produced a strong protest on the part of N. Jersey; and never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old." [3]

And further, *id.*, at 546–548:

> "Rh. I. was the only exception to a compliance with the recommendation from Annapolis [to have a Const. Convention], well known to have been swayed by an obdurate adherence to an advantage which her position gave her of taxing her neighbors thro' their consumption of imported supplies, an advantage which it was foreseen would be taken from her by a revisal of the Articles of Confederation.
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> . . . . .
>
> "The same want of a general power over Com-

[3] Madison noted the States' aversion to the transfer of power to a central government "notwithstanding the urgent demands of the Federal Treasury; the glaring inadequacy of the authorized mode of supplying it, the rapid growth of anarchy in the Fedl. System, and the animosity kindled among its members by their conflicting regulations." 3 Farrand 544. See also, *e. g.*, 1 *id.*, at 19 (Mr. Randolph's comments concerning defects of Articles of Confederation); *id.*, at 462 (Mr. Ghorum, in explaining why small States should not object to the formation of the Union, notes: "Should a separation of the States take place, the fate of N. Jersey wd. be worst of all. She has no foreign commerce & can have but little. Pa. & N. York will continue to levy taxes on her consumption"); 3 *id.*, at 328–329 (Mr. Madison's remarks during debate at the Virginia Convention).

> merce led to an exercise of this power separately, by the States, wch not only proved abortive, but engendered rival, conflicting and angry regulations. Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighbouring ports, and to co-erce a relaxation of the British monopoly of the W. Indn. navigation, which was attemted by Virga. . . . the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them, as N. Y. Pena. Virga. & S-Carolina."

The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power;[4] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States;[5] and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely

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[4] See, *e. g.*, *Brown* v. *Maryland*, 12 Wheat. 419, 439 (1827); *Cook* v. *Pennsylvania*, 97 U. S. 566, 574 (1878); *Youngstown Sheet & Tube Co.* v. *Bowers*, 358 U. S. 534, 555–556 (1959) (Frankfurter, J., dissenting); The Federalist Nos. 11 (Hamilton), 12 (Hamilton), 42 (Madison), 44 (Madison); 2 Farrand 135, 157–158, 169 (notes of Committee of Detail); *id.*, at 441; 3 *id.*, at 520–521 (letter of James Madison to Professor Davis); *id.*, at 547–548.

[5] See, *e. g.*, *Brown* v. *Maryland*, *supra*, at 439; *Youngstown Sheet & Tube Co.* v. *Bowers*, *supra*, at 556 (Frankfurter, J., dissenting); The Federalist No. 12.

flowing through their ports to the other States not situated as favorably geographically.[6]

Nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers of the Constitution. For such an exaction, unlike discriminatory state taxation against imported goods as imports, was not regarded as an impediment that severely hampered commerce or constituted a form of tribute by seaboard States to the disadvantage of the other States.

It is obvious that such nondiscriminatory property taxation can have no impact whatsoever on the Federal Government's exclusive regulation of foreign commerce, probably the most important purpose of the Clause's prohibition. By definition, such a tax does not fall on imports as such because of their place of origin. It cannot be used to create special protective tariffs or particular preferences for certain domestic goods, and it cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation.

Nor will such taxation deprive the Federal Government of the exclusive right to all revenues from imposts and duties on imports and exports, since that right by definition only extends to revenues from exactions of a particular category; if nondiscriminatory ad valorem taxation is not in that category, it deprives the Federal

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[6] See, *e. g.*, *Brown* v. *Maryland*, *supra*, at 440; *Cook* v. *Pennsylvania*, *supra*, at 574; *Youngstown Sheet & Tube Co.* v. *Bowers*, *supra*, at 545; *id.*, at 556–557 (Frankfurter, J., dissenting); 2 Farrand 441–442, 589; 3 *id.*, at 519 (letter of James Madison to Professor Davis).

Government of nothing to which it is entitled. Unlike imposts and duties, which are essentially taxes on the commercial privilege of bringing goods into a country, such property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth; there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods. The Import-Export Clause clearly prohibits state taxation based on the foreign origin of the imported goods, but it cannot be read to accord imported goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin for services which the State supplies. See, *e. g., May* v. *New Orleans,* 178 U. S. 496, 502–504, 507–509 (1900). It may be that such taxation could diminish federal impost revenues to the extent its economic burden may discourage purchase or importation of foreign goods. The prevention or avoidance of this incidental effect was not, however, even remotely an objective of the Framers in enacting the prohibition. Certainly the Court in *Brown* did not think so. See 12 Wheat., at 443–444. Taxes imposed after an initial sale, after the breakup of the shipping packages, or the moment goods imported for use are committed to current operational needs are also all likely to have an incidental effect on the volume of goods imported; yet all are permissible. See, *e. g., Waring* v. *The Mayor,* 8 Wall. 110 (1869) (taxation after initial sale); *May* v. *New Orleans, supra* (taxation after breakup of shipping packages); *Youngstown Sheet & Tube Co.* v. *Bowers,* 358 U. S. 534 (1959) (taxation of goods committed to current operational needs by manufacturer). What those taxes and nondiscriminatory ad valorem property taxes share, it should be emphasized, is

the characteristic that they cannot be selectively imposed and increased so as substantially to impair or prohibit importation.[7]

Finally, nondiscriminatory ad valorem property taxes do not interfere with the free flow of imported goods among the States, as did the exactions by States under the Articles of Confederation directed solely at imported goods. Indeed, importers of goods destined for inland States can easily avoid even those taxes in today's world. Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland States. Petitioner, for example, operates other distribution centers from wholesale warehouses in inland States. Actually, a quarter of the tires distributed from petitioner's Georgia warehouse are imported interstate directly from Canada. To be sure, allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by "inland" consumers.[8] But as already noted,

[7] Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost. Nothing in the opinion in *Brown* v. *Maryland* should suggest otherwise. The Court in *Brown* merely presumed that at these later stages of commercial activity, state impositions would not be discriminatory. But merely because *Brown* would have authorized a nondiscriminatory charge on even an importer's use of the services of a public auctioneer, see 12 Wheat., at 443, does not mean that it would have disapproved the holding of *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), which invalidated a tax on the sale of goods by auction that discriminated against foreign goods.

[8] Of course, depending on the relevant competition from domestic goods, an importer may be forced to absorb some of these ad valorem property assessments rather than passing them on to consumers.

such taxation is the *quid pro quo* for benefits actually conferred by the taxing State. There is no reason why local taxpayers should subsidize the services used by the importer; ultimate consumers should pay for such services as police and fire protection accorded the goods just as much as they should pay transportation costs associated with those goods.[9] An evil to be prevented

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[9] *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 299 (1852), upheld pilotage fees imposed by the city of Philadelphia. It expressly rejected the argument that these fees were prohibited "imposts or duties," *id.*, at 314:

"[The Import-Export Clause] was intended to operate upon subjects actually existing and well understood when the constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial States enforced their pilot-laws, as they were from charges for wharfage or towage, or any other local port-charges for services rendered to vessels or cargoes; and to declare that such pilot-fees or penalties are embraced within the words imposts or duties on imports, exports, or tonnage, would be to confound things essentially different, and which must have been known to be actually different by those who used this language. It cannot be denied that a tonnage duty, or an impost on imports or exports, may be levied under the name of pilot dues or penalties; and certainly it is the thing, and not the name, which is to be considered. But, having previously stated that, in this instance, the law complained of does not pass the appropriate line which limits laws for the regulation of pilots and pilotage, the suggestion, that this law levies a duty on tonnage or on imports or exports, is not admissible; and, if so, it also follows, that this law is not repugnant to the first clause of the eighth section of the first article of the constitution, which declares that all duties, imposts, and excises shall be uniform throughout the United States; for, if it is not to be deemed a law levying a duty, impost, or excise, the want of uniformity throughout the United States is not objectionable. Indeed, the necessity of conforming regulations of pilotage to the local peculiarities of each port, and the consequent impossibility of having its charges uniform throughout the United States, would be sufficient of itself to prove that they could not have been intended to be embraced within this clause of the constitution; for it cannot

by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States. In effect, the Clause was fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State.[10] A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed.[11]

Admittedly, the wording of the prohibition of the Import-Export Clause does not in terms except nondiscriminatory taxes with some impact on imports or exports. But just as clearly, the Clause is not written in terms of a broad prohibition of every "tax." The prohibition is only against States laying "Imposts or Duties" on "Imports." By contrast, Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises," which plainly lends support to a reading of the Import-Export Clause as not prohibiting every exaction or "tax" which falls in some measure on imported goods. Indeed, Professor Crosskey makes a persuasive demon-

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be supposed uniformity was required, when it must have been known to be impracticable."

Such fees, of course, would nevertheless likely increase the cost of the goods being imported. Thus more than a mere cost impact on imported goods is required before an exaction can be deemed to fall within the Clause's prohibition.

[10] See, *e. g.*, *License Cases*, 5 How. 504, 575–576 (1847) (Taney, C. J.).

[11] Such an assessment would also be invalid under traditional Commerce Clause analysis.

stration that the words "imposts" and "duties" as used in 1787 had meanings well understood to be exactions upon imported goods as imports. "Imposts" were like customs duties, that is, charges levied on imports at the time and place of importation. "Duties" was a broader term embracing excises as well as customs duties, and probably only capitation, land, and general property exactions were known by the term "tax" rather than the term "duty." 1 W. Crosskey, Politics and the Constitution in the History of the United States 296–297 (1953).[12] The characteristic common to both "im-

[12] In 2 Farrand 305, the following is reported as having occurred during the debate on the last draft of the Tax Clause submitted by the Committee of Detail:

"Mr. L. Martin asked what was meant by the Committee of detail (in the expression) *'duties'* and *'imposts.'* If the meaning were the same, the former was unnecessary; if different, the matter ought to be made clear.

"Mr. Wilson, *duties* are applicable to many objects to which the word *imposts* does not relate. The latter are appropriated to commerce; the former extend to a variety of objects, as stamp duties &c."

Subsequently, Mr. Martin also stated in his "Genuine Information" delivered to the Maryland Legislature, see 3 Farrand 203–204:

"By the *eighth* section of this article, Congress is to have power to *lay* and *collect taxes, duties, imposts,* and *excises.* When we met in convention after our adjournment, to receive the report of the committee of detail, the members of that committee were requested to inform us, what powers were meant to be vested in Congress by the word *duties* in this section, since the word *imposts* extended to duties on goods *imported,* and by another part of the system no duties on *exports* were to be laid. In answer to this inquiry, we were informed, that it was meant to give the general government the power of laying *stamp* duties on paper, parchment, and vellum. . . . By the power to lay and collect imposts, they may impose duties on *any* or *every* article of *commerce* imported into these States, to what amount they please. By the power to lay *excises,* a power very *odious* in its nature, since it authorizes officers to go into your *houses,* your *kitchens,* your *cellars,* and to examine into your *private*

posts" and "duties" was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Con-

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concerns, the Congress may impose *duties* on every *article* of *use* or *consumption*,—on the *food* that we *eat*, on the *liquors* we *drink*, on the *clothes* that we *wear*, the *glass* which *enlightens* our *houses*, or the *hearths* necessary for our *warmth* and *comfort*. By the power to lay and collect taxes, they may proceed to *direct taxation* on *every individual*, either by a *capitation* tax on their *heads*, or an *assessment* on their *property*. By this part of the section therefore, the government has power to lay what duties they please on *goods imported;* to lay what duties they please, afterwards, on whatever we *use* or *consume;* to impose *stamp duties* to what amount they please, and in whatever case they please; afterwards to impose on the people *direct taxes*, by capitation tax, or by assessment, to what amount they choose . . . ."

A similar recognition that commercial "imposts" do not encompass property "taxes" appears in The Federalist No. 12, pp. 80–81, 84 (Bourne ed. 1947):

"It is evident from the state of the country, from the habits of the people, from the experience we have had on the point itself, that it is impracticable to raise any very considerable sums by direct taxation. Tax laws have in vain been multiplied; new methods to enforce the collection have in vain been tried; the public expectation has been uniformly disappointed, and the treasuries of the States have remained empty. The popular system of administration inherent in the nature of popular government, coinciding with the real scarcity of money incident to a languid and mutilated state of trade, has hitherto defeated every experiment for extensive collections, and has at length taught the different legislatures the folly of attempting them.

"No person acquainted with what happens in other countries will be surprised at this circumstance. In so opulent a nation as that of Britain, where direct taxes from superior wealth must be much more tolerable, and, from the vigor of the government, much more practicable, than in America, far the greatest part of the national revenue is derived from taxes of the indirect kind, from imposts, and from excises. Duties on imported articles form a large branch of this latter description.

"In America, it is evident that we must a long time depend for

federation, were purposefully employed to regulate interstate and foreign commerce and tax States situated less favorably geographically.

In any event, since prohibition of nondiscriminatory ad valorem property taxation would not further the objectives of the Import-Export Clause, only the clearest constitutional mandate should lead us to condemn such taxation. The terminology employed in the Clause—"Imposts or Duties"—is sufficiently ambiguous that we decline to presume it was intended to embrace taxation

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the means of revenue chiefly on such duties. In most parts of it, excises must be confined within a narrow compass. The genius of the people will ill brook the inquisitive and peremptory spirit of excise laws. The pockets of the farmers, on the other hand, will reluctantly yield but scanty supplies, in the unwelcome shape of impositions on their houses and lands; and personal property is too precarious and invisible a fund to be laid hold of in any other way than by the imperceptible agency of taxes on consumption.

. . . . . .

"... A nation cannot long exist without revenues. Destitute of this essential support, it must resign its independence, and sink into the degraded condition of a province. This is an extremity to which no government will of choice accede. Revenue, therefore, must be had at all events. In this country, if the principal part be not drawn from commerce, it must fall with oppressive weight upon land. It has been already intimated that excises, in their true signification, are too little in unison with the feelings of the people, to admit of great use being made of that mode of taxation; nor, indeed, in the States where almost the sole employment is agriculture, are the objects proper for excise sufficiently numerous to permit very ample collections in that way. Personal estate (as has been before remarked), from the difficulty in tracing it, cannot be subjected to large contributions, by any other means than by taxes on consumption."

See also, *e. g.*, The Federalist Nos. 30, 32, 35, 36; T. Cooley, The General Principles of Constitutional Law in the United States c. V, § 3, c. VII, § 14 (Bruce ed. 1931); 2 J. Story, Commentaries on the Constitution of the United States §§ 946–950, 954, 1013–1014 (1833); n. 9, *supra*.

that does not create the evils the Clause was specifically intended to eliminate.

IV

The Court in *Low* v. *Austin* nevertheless expanded the prohibition of the Clause to include nondiscriminatory ad valorem property taxes, and did so with no analysis, but with only the statement that *Brown* v. *Maryland* had marked the line "where the power of Congress over the goods imported ends, and that of the State begins, with as much precision as the subject admits." 13 Wall., at 32. But the opinion in *Brown* v. *Maryland* cannot properly be read to propose such a broad definition of "imposts" or "duties." The tax there held to be prohibited by the Import-Export Clause was imposed under a Maryland statute that required importers of foreign goods, and wholesalers selling the same by bale or package, to obtain a license and pay a $50 fee therefor, subject to certain forfeitures and penalties for noncompliance. The importers contested the validity of the statute, arguing that the license was a "palpable evasion" of the Import-Export Clause because it was essentially equivalent to a duty on imports. They contended that asserted differences between the license fee and a tax directly imposed on imports were more formal than substantial: the privilege of bringing the goods into the country could not realistically be divorced from the privilege of selling the goods, since the power to prohibit sale would be the power to prohibit importation, 12 Wheat., at 422; the payment of the tax at the time of sale rather than at the time of importation would be irrelevant since it would still be a tax on the same privilege at either time, *id.*, at 423; and the fact that a license operates on the person of the importer while the duty operates on the goods themselves is irrelevant in that either levy would directly increase the cost of the goods, *ibid.* Since the

power to impose a license on importers would also entail a power to price them out of the market or prohibit them entirely, the importers concluded that such a power must be repugnant to the exclusive federal power to regulate foreign commerce, *id.*, at 423–425.

The Attorney General of Maryland, Roger Taney, later Chief Justice, defended the constitutionality of Maryland's law. He argued that the fee was not a prohibited "impost" or "duty" because the license fee was not a tax upon the imported goods, but on the importers, a tax upon the occupation and nothing more, and the Import-Export Clause prohibited only exactions on the right of importation and not an exaction upon the occupation of importers. He contended that, in any event, the Clause, if not read as prohibiting only exactions on the right of importation, but, more broadly, as also prohibiting exactions on goods imported, would necessarily immunize imports from all state taxation at any time. Moreover, if the privilege of selling is a concomitant of the privilege of importing, the argument proved too much; the importer could sell free of regulation by the States in any place and in any manner, even importing free of regulations concerning the bringing of noxious goods into the city, or auctioning the goods in public warehouses, or selling at retail or as a traveling peddler, activities that had traditionally been subject to state regulation and taxation.

The Court in *Brown* refused to define "imposts" or "duties" comprehensively, since the Maryland statute presented only the question "whether the legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported." 12 Wheat., at 436. However, in holding that the Maryland license fee was within prohibited "im-

posts, or duties on imports . . ." the Court significantly characterized an impost or duty as "a custom or a tax levied on articles brought into a country," *id.*, at 437, although also holding that, while normally levied before the articles are permitted to enter, the exactions are no less within the prohibition if levied upon the goods as imports after entry; since "imports" are the goods imported, the prohibition of imposts or duties on "imports" was more than a prohibition of a tax on the act of importation; it "extends to a duty levied after [the thing imported] has entered the country," *id.*, at 438. And since the power to prohibit sale of an article is the power to prohibit its introduction into the country, the privilege of sale must be a concomitant of the privilege of importation, and licenses on the right to sell must therefore also fall within the constitutional prohibition. *Id.*, at 439.

Taney's argument was persuasive, however, to the extent that the Court was prompted to declare that "the words of the prohibition ought not to be pressed to their utmost extent; . . . in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view . . . . [T]here must be a point of time when the prohibition ceases, and the power of the State to tax commences . . . ." *Id.*, at 441.

The Court stated that there were two situations in which the prohibition would not apply. One was the case of a state tax levied after the imported goods had lost their status as imports. The Court devised an evidentiary tool, the "original package" test, for use in making that determination. The formula was: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported,

that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution." *Id.*, at 441–442. "It is a matter of hornbook knowledge that the original package statement of Justice Marshall was an illustration, rather than a formula, and that its application is evidentiary, and not substantive . . . ." *Galveston* v. *Mexican Petroleum Corp.*, 15 F. 2d 208 (SD Tex. 1926).

The other was the situation of particular significance to our decision of this case, that is, when the particular state exaction is not a prohibited "impost" or "duty." The Court first stated its view of the characteristics of prohibited state levies. It said that the obvious clue was the express exception of the Import-Export Clause authorizing "imposts or duties" that "may be absolutely necessary for executing [the State's] inspection Laws." "[T]his exception," said the Court, "in favour of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of *a similar character* with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited." 12 Wheat., at 438 (emphasis supplied). The characteristic of the prohibited levy, the Court said later in the opinon—illustrated by the Maryland license tax—was that "the tax intercepts the import, *as an import*, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State." *Id.*, at 443 (em-

phasis supplied). The Court illustrated the kinds of state exactions that in its view fell without the prohibition as examples of neutral and nondiscriminatory taxation: a tax on itinerant peddlers, a service charge for the use of a public auctioneer, a property tax on plate or furniture personally used by the importer. These could not be considered within the constitutional prohibition because they were imposed without regard to the origin of the goods taxed. *Id.*, at 443, 444. In contrast, the Maryland exaction in question was a license fee which singled out imports, and therefore was prohibited because "the tax intercepts the import, *as an import,* in its way to become incorporated with the general mass of property." *Id.*, at 443. (Emphasis supplied.)

Thus, it is clear that the Court's view in *Brown* was that merely because certain actions taken by the importer on his imported goods would so mingle them with the common property within the State as to "lose their distinctive character as imports" and render them subject to the taxing power of the State, did not mean that in the absence of such action, no exaction could be imposed on the goods. Rather, the Court clearly implied that the prohibition would not apply to a state tax that treated imported goods in their original packages no differently from the "common mass of property in the country"; that is, treated it in a manner that did not depend on the foreign origins of the goods.

Despite the language and objectives of the Import-Export Clause, and despite the limited nature of the holding in *Brown* v. *Maryland*, the Court in *Low* v. *Austin* ignored the warning that the boundary between the power of States to tax persons and property within their jurisdictions and the limitations on the power of the States to impose imposts or duties with respect to "imports" was a subtle and difficult line which

must be drawn as the cases arise. *Low* v. *Austin* also ignored the cautionary remark that, for those reasons, it "might be premature to state any rule as being universal in its application." 12 Wheat., at 441. Although it was "sufficient" in the context of Maryland's license tax on the right to sell imported goods to note that a tax imposed directly on imported goods which have not been acted upon in any way would clearly fall within the constitutional prohibition, that observation did not apply, as the foregoing analysis indicates, to a state tax which treated those same goods without regard to the fact of their foreign origin.

Low v. *Austin* compounded the error in misreading the *Brown* opinion by the further error of misreading the views of Mr. Chief Justice Taney as expressed in his opinion in the *License Cases*, 5 How. 504 (1847) (six Justices wrote separately in the cases). As already observed, when the Chief Justice was Attorney General of Maryland he argued *Brown* v. *Maryland* for the State. He had argued that the Maryland license fee requirement fell upon the importer, not the imported goods, and therefore fell without the Import-Export Clause's prohibition against imposts or duties on "imports." In the *License Cases* he observed that "further and more mature reflection has convinced me that the rule laid down [in *Brown* v. *Maryland*] is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the judicial mind. In the nature of things, the line of division is in some degree vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the

constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government." 5 How., at 575.

Low v. *Austin* quoted this excerpt, 13 Wall., at 33–34, as supporting the holding, *id.*, at 34, that "a tax upon [imported goods], in any shape, is within the constitutional prohibition." But Mr. Chief Justice Taney said much more in his opinion in the *License Cases*, and what he said further makes crystal clear that the prohibition applied only to state exactions upon imports *as imports* and did not apply to nondiscriminatory ad valorem property taxes. For, continuing his analysis in the very paragraph from which *Low* v. *Austin* excerpted only a part, he concluded: "A tax in any shape . . . cannot be done directly, in the shape of a *duty on imports*, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form." 5 How., at 576 (emphasis supplied). The Chief Justice then went on to distinguish an exaction upon imports *as imports* from property taxes indiscriminately applied to all owners of property, stating, *ibid.*:

> "Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; *and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell,* or any other property of which he is the owner.

> But a tax of this description stands upon a very different footing from a tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State." (Emphasis supplied.)

Thus Mr. Chief Justice Taney's opinion is authority, precisely contrary to the reading of *Low* v. *Austin*, that nondiscriminatory ad valorem property taxes are not prohibited by the Import-Export Clause.

It follows from the foregoing that *Low* v. *Austin* was wrongly decided. That decision therefore must be, and is, overruled.[13]

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[13] In another context, this Court said that "[i]n view of the fact that the Constitution gives Congress authority to consent to state taxation of imports and hence to lay down its own test for determining when the immunity ends, we see no convincing practical reason for abandoning the test which has been applied for more than a century . . . ." *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 668 (1945). However, this overlooked the fact that the Import-Export Clause contains a provision that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States . . . ." Although the Constitutional Convention had refused to make the Import-Export Clause's prohibition of state exactions absolute, it immediately added that proviso, which Mr. Madison supported "as preventing all State imposts." 2 Farrand 441–442. See also, *e. g.*, 3 *id.*, at 215–216 (Luther Martin's "Genuine Information"). Of course, Congress presumably could enact other legislation transferring the funds back to the States after they were put to "the Use of the Treasury of the United States." But may Congress consent to state exactions if they are not uniform throughout the United States, since any congressional taxation must conform to the mandate of Art. I, § 8, cl. 1, that "all Duties, Imposts, and Excises shall be uniform throughout the United States"? If Congress may authorize, under the Import-Export Clause, an exaction that it could not directly impose under the Tax Clause, would that not permit Congress to undermine the policies which both Clauses were fashioned to secure? Since, however, we hold that *Low* v. *Austin*

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Petitioner's tires in this case were no longer in transit. They were stored in a distribution warehouse from which petitioner conducted a wholesale operation, taking orders from franchised dealers and filling them from a constantly replenished inventory. The warehouse was operated no differently than would be a distribution warehouse utilized by a wholesaler dealing solely in domestic goods, and we therefore hold that the nondiscriminatory property tax levied on petitioner's inventory of imported tires was not interdicted by the Import-Export Clause of the Constitution. The judgment of the Supreme Court of Georgia is accordingly

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring in the judgment.

Being of the view that the goods involved here had lost their character as imports and that subjecting them to ad valorem taxation was consistent with the Constitution as interpreted by prior cases, including *Low* v. *Austin*, 13 Wall. 29 (1872), I would affirm the judgment. There is little reason and no necessity at this time to overrule *Low* v. *Austin*. None of the parties has challenged that case here, and the issue of its overruling has not been briefed or argued.

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was not properly decided, there is no occasion to address the question whether Congress could have constitutionally consented to state nondiscriminatory ad valorem property taxes if they had been within the prohibition of the Import-Export Clause.

Syllabus

UNITED STATES v. BORNSTEIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–712. Argued October 8, 1975—Decided January 14, 1976

A prime contractor (Model) had a contract with the Government to provide radio kits containing electron tubes meeting certain specifications. A subcontractor (United), which was to supply the tubes, sent to Model in three separately invoiced shipments tubes that were not of the required quality but were falsely marked to indicate that they were. The radio kits that Model in turn shipped to the Government contained 397 of these falsely marked tubes. Model then sent 35 invoices to the Government for the kits, each invoice including claims for payment for the falsely marked tubes. After the Government discovered the fraud, it recovered in settlement from Model $40.72 per tube or a total of $16,165.84. Subsequently the Government sued United and two of its owner-officers (respondents) under the False Claims Act (Act), which provides that the Government may recover from a person who presents a false claim or causes a false claim to be presented to it a forfeiture of $2,000 plus an amount equal to double the amount of damages that it sustains by reason of the false claim. The Government alleged that United was liable for 35 $2,000 forfeitures, one for each invoice that it "caused" Model to submit, and also claimed damages of $16,205.54, consisting of a replacement cost of $40.82 per tube for 397 tubes. The District Court agreed that there had been 35 forfeitures, but ruled that before the Government's damages could be doubled, they had to be reduced by the amount of Model's payment to the Government, and accordingly computed double damages at only $79.40 (double the 10-cent difference per tube between its replacement cost and the payment already received from Model). On cross-appeals, the Court of Appeals agreed with the District Court on the double-damages issue, but held that since there had been only one subcontract involved there should be only one forfeiture. *Held:*

1. A correct application of the Act's language requires that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the forfeiture. Thus,

here United committed three acts that caused Model to submit false claims to the Government—the three separately invoiced shipments of falsely branded tubes to Model—and hence is liable for three $2,000 forfeitures representing those three shipments. Pp. 308–313.

(a) The number of $2,000 forfeitures is not to be measured by the number of contracts involved, since such an automatic measurement, which would almost always result in only a single forfeiture no matter how many fraudulent acts the subcontractor might have committed, would not only contravene the Act's plain language, which focuses on false claims not on contracts, but would defeat the statutory purpose of punishing and preventing frauds. Pp. 310–311.

(b) Nor is the number of forfeitures to be measured by the 35 false claims presented by Model to the Government, since this method fails to distinguish between the acts committed by Model and those committed by United, a critical distinction since the Act imposes liability only for the conduct that causes false claims to be presented. Thus here the statute does not penalize United for what Model did but penalizes United for what *it* did. Pp. 311–313.

2. In computing the double damages authorized by the Act, the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received from any source. This computation method best conforms to the Act's language and reflects the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims; fixes the defrauder's liability without reference to the adventitious actions of other persons (such as the prime contractor here); and forecloses the subcontractor from avoiding the double-damages provision by tendering the amount of the undoubled damages at any time before judgment. Pp. 313–317.

504 F. 2d 368, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined, and in Parts I and III of which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and WHITE, J., joined,

post, p. 317. STEVENS, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Jones argued the cause for the United States. With him on the brief were *Solicitor General Bork*, *Acting Assistant Attorney General Jaffe*, and *David M. Cohen*.

Jack Ballan argued the cause and filed a brief for respondent Bornstein. *William Rossmoore* argued the cause and filed a brief for respondent Page.

MR. JUSTICE STEWART delivered the opinion of the Court.

The False Claims Act provides that the United States may recover from a person who presents a false claim or causes a false claim to be presented to it a forfeiture of $2,000 plus an amount equal to double the amount of damages that it sustains by reason of the false claim.[1] This case presents two interpretative problems

[1] The False Claims Act was adopted in 1863. Act of Mar. 2, 1863, c. 67, 12 Stat. 696. It was re-enacted as Rev. Stat. §§ 3490–3494, 5438. The part of the Act dealing with civil prohibitions is now codified in 31 U. S. C. § 231 *et seq.* The language used in Title 31 differs in some important respects from that contained in the Revised Statutes. Since Title 31 has not been enacted into positive law, the official text of the statute is that which appears in the Revised Statutes. See *United States* v. *Neifert-White Co.*, 390 U. S. 228, 228–229, n. 1; *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 539–540, and n. 2.

The relevant statutory provisions are as follows:

§ 3490. "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title 'CRIMES,' shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together

that arise when the United States sues a subcontractor under the Act on the ground that the subcontractor has caused the prime contractor to present false claims: First,

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with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

§ 5438. "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more

how should the number of $2,000 forfeitures be counted? Second, when the United States has already recovered damages from the prime contractor because of the subcontractor's fraud, what effect does that recovery have upon the Government's right to recover double damages from the subcontractor?

I

In 1962, the United States entered into a $2,100,000 contract with Model Engineering & Manufacturing Corporation, Inc. (Model), for the provision of radio kits. Each kit was to contain electron tubes that met certain specifications. Model subcontracted with United National Labs (United) to supply these tubes at a price of $32 each. The tubes that United sent to Model under this subcontract were not of the required quality, but were falsely marked by United to indicate that they were. United sent at least 21 boxes of these falsely marked tubes to Model, in three separately invoiced shipments. The radio kits that Model in turn shipped to the United States contained 397 of those falsely marked tubes. Model sent 35 invoices to the Government for the radio kits, and each invoice included claims for payment for the falsely marked tubes that had been supplied to Model by United. After the Government discovered the fraud, it recovered $40.72 per tube from Model and also retained the falsely marked tubes.

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than five years, or fined not less than one thousand nor more than five thousand dollars."

Section 5438 was repealed in 1909. Act of Mar. 4, 1909, c. 321, § 341, 35 Stat. 1153. It has continued vitality only insofar as it specifies the acts giving rise to civil liability under § 3490. See *United States* v. *Neifert-White Co., supra.* The criminal prohibitions were subsequently altered and codified in 18 U. S. C. §§ 287 and 1001.

Subsequently, the Government brought this civil action in a Federal District Court under the False Claims Act against United and two of its owner-officers, the respondents Philip L. Bornstein and Gerald Page.[2] The complaint alleged that United was liable for 35 $2,000 forfeitures—one forfeiture for each invoice that it had "caused" Model to submit,[3] and also claimed damages of $16,205.54, consisting of $40.82 per tube for 397 tubes. The trial court agreed that there had been 35 forfeitures, but ruled that before the Government's damages could be doubled, they were to be reduced by the amount of Model's payment to the United States. The court accordingly computed double damages at only $79.40 and awarded the Government a total of $70,079.40. 361 F. Supp. 869 (NJ). On cross-appeals the Court of Appeals agreed with the trial court on the double-damages issue, but concluded that since there had been only one subcontract involved, there should be only one statutory forfeiture. Accordingly, the appellate court held that United was liable for only $2,079.40. 504 F. 2d 368 (CA3). We granted the Government's petition for certiorari to consider the statutory questions presented. 420 U. S. 906.

II

The Number of Statutory Forfeitures

The False Claims Act provides that a person "who

[2] United was dismissed as a party prior to judgment. For convenience, however, the respondents are sometimes referred to in this opinion as United. The United States also brought criminal charges against Bornstein and Page. They pleaded guilty to those charges and were given suspended sentences.

[3] The Government also claimed that United was liable for three additional $2,000 forfeitures under the second clause of § 5438 which prohibits the preparation and use of false documents in support of a false claim. See n. 1, *supra*. The Government does not press that claim here.

shall do or commit any of the acts prohibited by" Rev. Stat. § 5438 "shall forfeit and pay to the United States the sum of two thousand dollars . . . ." Rev. Stat. § 3490. Section 5438 makes it illegal for a person to present or cause to be presented "for payment or approval . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent." It is settled that the Act permits recovery of multiple forfeitures and that it gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government. See *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537. The precise issue presented here is whether the subcontractor should be liable for each claim submitted by its prime contractor or whether it should be liable only for certain identifiable acts that it itself committed.[4]

The legislative history of the Act offers little guidance on how properly to determine the number of forfeitures. The Act was originally aimed principally at stopping the massive frauds perpetrated by large contractors during the Civil War.[5] There is no indication that Con-

[4] In cases involving prime contractors the number of imposable forfeitures has generally been set at the number of individual false payment demands that the contractor has made upon the Government. See, *e. g., United States* v. *Woodbury,* 359 F. 2d 370, 377–378 (CA9); *Fleming* v. *United States,* 336 F. 2d 475, 480 (CA10); *United States* v. *National Wholesalers,* 236 F. 2d 944, 950 (CA9); *Faulk* v. *United States,* 198 F. 2d 169, 171 (CA5); *United States* v. *Grannis,* 172 F. 2d 507, 515–516 (CA4); *United States* v. *Collyer Insulated Wire Co.,* 94 F. Supp. 493, 496–498 (RI). Cf. *United States* v. *Ueber,* 299 F. 2d 310 (CA6). This result is in accord with this Court's statement that " 'the conception of a claim against the government normally connotes a demand for money or for some transfer of public property.' " *United States* v. *McNinch,* 356 U. S. 595, 599, quoting *United States* v. *Tieger,* 234 F. 2d 589, 591 (CA3).

[5] According to its sponsor, the False Claims Act was adopted

gress gave any thought to the question of how the number of forfeitures should be determined in cases involving subcontractor fraud. But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question.

The respondents defend the decision of the Court of Appeals that held them liable for only one forfeiture. In reaching this conclusion the Court of Appeals relied principally on its earlier decision in *United States* v. *Rohleder*, 157 F. 2d 126 (CA3), where it found that 16 forfeitures were appropriate because 16 contracts were involved. The *Rohleder* court had relied in turn on this Court's decision in *United States ex rel. Marcus* v. *Hess*, *supra*. The *Hess* case involved several electrical contractors who had collusively bid on 56 Public Works Administration projects. The District Court in *Hess* had imposed 56 forfeitures, rejecting the defendants' claim that only one forfeiture should have been imposed because there had been only one fraudulent scheme. This Court concluded that the District Court was correct because the incidence of fraud on each separate project was clearly individualized. 317 U. S., at 552. No party argued in this Court that more than 56 forfeitures should have been imposed, and no statement in the *Hess* opinion expressly limited the number of imposable forfeitures to the number of contracts involved in a case. *Hess* simply approved the result reached by the District Court which had found that "in each project there was a single, false, or fraudulent claim." 41 F. Supp. 197, 216 (WD Pa.).

"for the purpose of punishing and preventing . . . frauds." Cong. Globe, 37th Cong., 3d Sess., 952 (remarks of Sen. Howard). See also *id.*, at 955 (remarks of Sen. Wilson).

The *Hess* case, therefore, in no way stands for the proposition that the number of forfeitures is inevitably measured by the number of contracts involved in a case. Such an automatic measurement would ignore the plain language of the statute, as the present case itself illustrates. United is liable under the statute only because it engaged in conduct that caused false claims to be submitted to the United States. While it is true that no false claims would have been submitted had United and Model not entered into a contractual relationship, the entry into that relationship did not in itself cause the submission of any false claims. Had United shipped tubes of the required quality to Model, no false claims would have been presented. By the same token, Model was not caused to file a false claim until it received shipments of falsely branded tubes from United. The language of the statute focuses on false claims, not on contracts. See n. 4, *supra*. That language does not support a conclusion that United is chargeable with only one forfeiture in this case.

To equate the number of forfeitures with the number of contracts would in a case such as this result almost always in but a single forfeiture, no matter how many fraudulent acts the subcontractor might have committed. This result would not only be at odds with the statutory language; it would also defeat the statutory purpose.[6] Such a limitation would, in the language of the Government's brief, convert "the Act's forfeiture provision into little more than a $2,000 license for subcontractor fraud."

At the other extreme, the Government urges that 35 forfeitures should be assessed, in accord with the position of the District Court, which ruled that "[United's fraudulent] acts caused Model to submit thirty-five false

[6] See n. 5, *supra*.

claims, each of which constituted a separate violation justifying a separate forfeiture." 361 F. Supp., at 879. The difficulty with this position is that it fails to distinguish between the acts committed by Model and the acts committed by United.[7] The distinction is a critical one, because the statute imposes liability only for the commission of acts which cause false claims to be presented.

If United had committed one act which caused Model to file a false claim, it would clearly be liable for a single forfeiture. If, as a result of the same act by United, Model had filed three false claims, United would still have committed only one act that caused the filing of false claims, and thus, under the language of the statute, would again be liable for only one forfeiture. If, on the other hand, United had committed three separate such causative acts, United would be liable for three forfeitures, even if Model had filed only one false claim. The Act, in short, penalizes a person for his own acts, not for the acts of someone else.

The Government's claim that United "caused" Model to submit 35 false claims is simply not accurate. While United committed certain acts which caused Model to submit false claims, it did not cause Model to submit any particular number of false claims. The fact that Model chose to submit 35 false claims instead of some other number was, so far as United was concerned, wholly irrelevant—completely fortuitous and beyond United's knowledge or control. The Government suggests that United assumed the risk that Model might send 35 invoices when United sent the falsely branded tubes to Model. The statute, however, does not penalize United for what Model did. It penalizes United for what *it* did. The construction given to the statutory

[7] Cf. *United States* v. *Ueber*, 299 F. 2d 310 (CA6).

language by the District Court is, therefore, no more satisfactory than the interpretation adopted by the Court of Appeals.

A correct application of the statutory language requires, rather, that the focus in each case be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures. In the present case United committed three acts which caused Model to submit false claims to the Government—the three separately invoiced shipments to Model. If United had not shipped any falsely branded tubes to Model, Model could not have incorporated such tubes into its radio kits and would not have had occasion to submit any false claims to the United States. When, however, United dispatched each shipment of falsely marked tubes to Model, it did so knowing that Model would incorporate the tubes into the radio kits it later shipped to the Government, and that it would ask for payment from the Government on account of those tubes. Thus, United's three shipments of falsely branded tubes to Model caused Model to submit false claims to the United States, and United is thus liable for three $2,000 statutory forfeitures representing the three separate shipments that it made to Model.[8]

III

Computation of Double Damages

In the District Court "[t]he Government . . . established that the per unit cost to replace the [falsely

[8] This Court has noted that in construing § 5438 "we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible [of] numerous definitions." *United States* v. *McNinch*, 356 U. S., at 598. See also *Rainwater* v. *United States*, 356 U. S. 590, 592–593.

branded] tubes was $40.82." 361 F. Supp., at 875. Finding that the Government had already received $40.72 per tube as damages from Model, the court concluded, and the Court of Appeals agreed, that the Government's total statutory damages were $79.40—double the 10-cent difference per tube between its replacement costs and the payment already received from Model for the 397 tubes.

The Government argues that both courts were wrong, and that its damages under the Act should be calculated by doubling the amount of its original loss and only then deducting Model's payment from that doubled amount.[9] We agree that the Government's damages should be doubled before any compensatory payments are deducted, because that method of computation most faithfully conforms to the language and purpose of the Act.[10]

Although there is nothing in the legislative history that specifically bears on the question of how to calculate double damages, past decisions of this Court have reflected a clear understanding that Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded. "We think the chief purpose of the [Act's civil penalties] was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *United States ex rel. Marcus* v. *Hess*, 317 U. S., at 551–552. For

[9] At one point in this litigation the Government urged that any compensatory payments it received should not be deducted from its statutory damages at all. It has now abandoned that position, perhaps for the reason that since United is liable to Model for Model's payment to the United States, United would in effect be assessed triple damages under such a rule.

[10] The statute speaks of doubling "damages" and not doubling "net damages" or "uncompensated damages."

several different reasons, this make-whole purpose of the Act is best served by doubling the Government's damages before any compensatory payments are deducted.

First, this method of computation comports with the congressional judgment that double damages are necessary to compensate the Government completely for the costs, delays, and inconveniences occasioned by fraudulent claims.[11] Second, the rule that damages should be doubled prior to any deductions fixes the liability of the defrauder without reference to the adventitious actions of other persons. The position adopted by the Court of Appeals would mean that two subcontractors who com-

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[11] As originally enacted, the False Claims Act contained a *qui tam* provision which authorized any person to bring an action on behalf of the United States to recover the civil penalties that could be imposed under the Act. Act of Mar. 2, 1863, § 4, 12 Stat. 698. If successful, the person would receive one-half of the damages awarded to the United States. § 6. Respondents suggest that double damages were provided by Congress because it knew that half of the Government's recovery would go to a private person and that as a result double damages were necessary in order to allow the Government's share of the proceeds of a suit to cover the Government's single damages. Thus, they argue that Congress never concluded that the United States needed to recover double damages in order to be made completely whole.

This argument would have some force if the only enforcement mechanism provided in the Act were the *qui tam* action. However, the Act clearly envisioned that the Government could sue on its own behalf, § 4, and it specifically exhorted United States attorneys to enforce the Act diligently. § 5. Moreover, in 1943 Congress placed restrictions on the possibility of bringing a *qui tam* action and limited a private person's recovery to a maximum of one quarter of the damages awarded the United States, Act of Dec. 23, 1943, c. 377, 57 Stat. 608. In adopting these changes, Congress did not make any adjustment in the double-damages provision, again suggesting that it thought that double damages are necessary to make the United States whole in fraudulent-claim cases.

mitted similar acts and caused similar damage could be subjected to widely disparate penalties depending upon whether and to what extent their prime contractors had paid the Government in settlement of the Government's claims against them. Just as fortuitous acts of the prime contractor should not determine the liability of the subcontractor under the forfeiture provision of the Act, so likewise the prime contractor's fortuitous acts should not determine the liability of the subcontractor under the double-damages provision. Third, the reasoning of the Court of Appeals and the District Court would enable the subcontractor to avoid the Act's double-damages provision by tendering the amount of the undoubled damages at any time prior to judgment. This possibility would make the double-damages provision meaningless. Doubling the Government's actual damages before any deduction is made for payments previously received from any source in mitigation of those damages forecloses such a result.[12]

For these reasons we hold that, in computing the double damages authorized by the Act, the Government's actual damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from any source.[13] This method of

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[12] The only two District Courts that have addressed this question have reached opposing results. Compare *United States* v. *Klein*, 230 F. Supp. 426, 443 (WD Pa.), aff'd *per curiam*, 356 F. 2d 983 (CA3) (damages doubled after offsetting credits deducted), with *United States* v. *Globe Remodeling Co.*, 196 F. Supp. 652, 657 (Vt.) (damages doubled before offsetting credits deducted).

[13] The Government's actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality. C. McCormick, Law of Damages § 42, p. 137 (1935). See, *e. g.*, *United States* v. *Cooperative Grain & Supply Co.*, 476 F. 2d 47, 61–65 (CA8); *United States* v. *Foster Wheeler Corp.*,

computation, which maximizes the deterrent impact of the double-damages provision and fixes the relative rights and liabilities of the respective parties with maximum precision, best comports in our view with the language and purpose of the Act.

The judgment is reversed, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE join, concurring in part and dissenting in part.

I join the opinion of the Court with respect to Part III's treatment of the double-damages issue. But the narrow construction of the False Claims Act adopted by the Court in Part II of the opinion, while not repugnant to the face of the statute itself, is by no means the only permissible construction of that language. Because that construction, as applied to the facts of this case, leads to an arbitrary result providing a windfall for those who would seek to defraud the Government, I would construe the statute somewhat differently than does the Court. Instead of concentrating in isolation on the "conduct of the person from whom the Government seeks to collect the statutory

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447 F. 2d 100, 102 (CA2); *United States* v. *Woodbury*, 359 F. 2d, at 379; *Toepleman* v. *United States*, 263 F. 2d 697, 700 (CA4); *United States* v. *Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 205 (NJ); *United States* v. *American Packing Corp.*, 125 F. Supp. 788, 791 (NJ); but cf. *United States* v. *Aerodex, Inc.*, 469 F. 2d 1003, 1010–1011 (CA5); *Faulk* v. *United States*, 198 F. 2d 169, 172 (CA5).

forfeitures," as the Court does, I believe that the statute requires inquiry as to the relationship, in terms of proximate cause and foreseeability, between the conduct of such person and the number of false claims actually presented to the Government.

Revised Stat. § 3490 provides that any nonmilitary person "who shall do or commit any of the acts prohibited by any" of the provisions of Rev. Stat. § 5438 "shall forfeit and pay" $2,000 to the United States. The "act" which is prohibited by the first clause of § 5438, at issue here, is the "mak[ing] or caus[ing] to be made, or present[ing] or caus[ing] to be presented, for payment . . . any claim . . . against the Government . . . knowing such claim to be false, fictitious, or fraudulent . . . ." That which is proscribed, then, is the causing to be presented a false claim against the Government with knowledge of the falsity of the claim.

Reading the pertinent portion of the above to impose liability only for the "commission of acts *which* cause false claims to be presented" (emphasis added), the Court construes this language to require the trier of fact to "focus in each case . . . upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." It then goes on to hold, apparently as a matter of law, that "the three separately invoiced shipments to Model" were the causative "acts" to which forfeiture liability attaches. As may be more readily seen from an examination of the facts of this case, this extremely narrow construction and application produce a result which bears little relationship to the congressional purpose.

The stipulated facts reveal a complex and altogether deliberate scheme to palm off cheaper, surplus tubes to the prime contractor, Model. Model had contracted to build radio kits for use by the Army. The specifications

for the component parts reflected the Army's understandable desire that military equipment be long lasting and reliable. The radios were to contain new 4X150G electron tubes bearing markings that, pursuant to the underlying military procurement specifications, showed they were manufactured in a plant whose quality-control standards measured up to certain Government requirements *and* were "source" inspected and approved by a Government inspector at the plant during manufacturing.[1] As far as the military was concerned (as opposed to commercial buyers), Eimac was the only authorized manufacturer. Tubes made by Eimac at its designated plant, accompanied by the proper "source" inspection and stamped accordingly, were the only ones qualified to receive genuine affixations. These stringent requirements were reflected in Eimac's market price of $40 per tube.

Respondents, however, with full awareness of what was required under Model's contract, got themselves caught between that market price and their own promise to deliver some 1,000 tubes at $32 each. Model had al-

[1] One such required marking is the "JAN" prefix, which stands for Joint Army Navy qualification standard. This brand, registered by the Patent Office, is to be used by the manufacturer only after the tubes have passed Government inspection at the place of manufacture during the manufacturing process. 361 F. Supp. 869, 872 n. 3 (NJ 1973). In addition, following the JAN prefix is the Manufacturer's Qualification Code, which shall be used only by the manufacturer to whom it has been assigned and only as a part of the designation on tubes manufactured at the plant to which qualification approval was granted. *Id.*, at 871 n. 2. Only manufacturers whose plants have passed rigorous qualifying tests are issued this Code. The Code for the sole authorized maker of these tubes was "CIM," which identified Eitel McCullough, Inc. (Eimac), a California corporation. In addition to the JAN–CIM brand on tubes that passed all of the tests, Eimac would imprint a four-figure number indicating the year and week of acceptance. *Id.*, at 872.

ready rejected United's first shipment of 120 *surplus* tubes; with none of them bearing the requisite markings, nonconformity was obvious. The only way respondents were going to profit under their contract with Model was to ship electron tubes that had the appearance of being new and genuine JAN-type [2] electron tubes, bearing markings as if they had been produced by Eimac under the strictures of the Government inspection process. To that end, they bought several hundred surplus tubes, at $17.50 each, from a distributor of Eimac and affixed, on each one, the JAN stamp, a "Manufacturer's Qualification Code" [3] (Eimac's) and an "acceptance" date, all of which markings were palpably false and designed to deceive Model. To complete the illusion, respondents sent the falsely stamped tubes to a testing laboratory where, after inspection, 21 packing lists (referencing the serial numbers) were prepared, each stamped, falsely, with a facsimile of a Government inspector's "Eagle" stamp.[4] The 21 boxes were then combined in three separate shipments, respondents certifying with each shipment that the tubes conformed to the contract. Duped into accepting the tubes as genuine, Model paid each of the three invoices and incorporated the fraudulent tubes into the radio kits. Model was paid, of course, on 35 separate invoices.

Applying its construction of the statutory language to this multifaceted shell game, the Court concludes that the only "acts" which "caused" the submission of false claims were the three separately invoiced shipments,

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[2] See n. 1, *supra*.

[3] See *ibid*.

[4] As proof that the JAN stamp in fact represents the required Government "source" inspection, the Government inspector imprints his "Eagle" acceptance stamp on packing lists accompanying each shipment of tubes. 504 F. 2d 368, 369 (CA3 1974).

reasoning that but for the shipment of "falsely branded" tubes the radio kits, and in turn Model's claims to the Government, would have been genuine. However, the three invoiced shipments were among a host of fraudulent acts, with respect to each of which it could be said that "but for" that act Model's claims to the Government would have been genuine. Had respondents not falsely marked each of the 300-odd tubes which were actually shipped to Model, or had the 21 packing lists covering them not been falsely stamped, it could equally well be said that Model would have submitted no false claims to the Government respecting the tubes supplied by respondents.[5] Thus, on the basis of "but for" causation, which is all the Court's justification really amounts to, there is no support whatever for picking the number 3 in preference to the number 21, or for picking either of those numbers in preference to the total number of tubes each of which was falsely marked. The only way these various "acts" can be distinguished from one another, so far as causation is concerned, is their proximity in time to the submission of the false claims by Model.

The Court's construction of the statute, as applied to these facts, leads to a result which is not only arbitrary but has the effect of allowing those who would defraud the Government to minimize their potential penalties by shipping all of their rotten eggs in one basket. I believe that a somewhat different construction is at least equally consistent with the language and would produce a result far more consistent with the congressional purpose to penalize those who would defraud the Government.

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[5] Indeed, the facts show that without the false stamping and the false packing lists, no claims *at all* would have been presented by Model, because Model, as it did with respect to the first 120-tube shipment, would have continued to reject tubes whose nonstamping clearly showed them to be nonconforming.

The "act" proscribed is causing a false claim to be presented to the Government with knowledge of its falsity. The Court simply counts the number of causative acts irrespective of the number of false claims actually submitted because the latter number is, in the words of the Court, "wholly fortuitous." But the foregoing examination has shown that the Court's preference for focusing on the "acts" of the subcontractor in isolation leads to an equally fortuitous result. I think that Congress intended the trier of fact in cases such as this to consider not only the "act" of the subcontractor, but also the number of false claims which the act or various acts of the subcontractor caused to be submitted. The first clause of § 5438 by its very terms focuses on protecting the Government not simply from fraud "in the air" but from the presentation for payment of fraudulent *claims*. The Court notes with approval cases involving prime contractors where the number of imposable forfeitures has turned on the number of false-payment demands made upon the Government. *Ante*, at 309 n. 4. If a prime contractor utilized an innocent agent to present a single false claim to a Government agency, but in fact the agent proceeded to split that claim up into multiple invoices, it would mock the statute to suggest that the prime contractor could avoid multiple forfeitures by claiming that he was unable to foresee his agent's conduct. The Court's construction does indeed suggest that in that case the prime contractor could cry "fortuity."

There is nothing on the face of the statute, however, to indicate congressional intent to treat deceitful prime contractors and subcontractors according to the mechanics of the underlying fraud. Instead, the verbal linkage of "acts," "causes," and "false claim" is couched in general terms pointing to a uniform construction: the number of imposable forfeitures in each case under

the first clause is keyed to the number of false claims submitted.[6] The language further suggests an interpretation in terms of traditional concepts of causation. Such concepts, whether denominated "proximate cause" or "legal" cause, frequently result in the imposition of liability even upon a *negligent* actor for consequences of which he could not have been absolutely certain at the time he acted, so long as those consequences might reasonably have been foreseen. See W. Prosser, The Law of Torts §§ 42, 43 (4th ed. 1971); Restatement (Second) of Torts § 435 (1965). I would remand this case to the District Court for assessment of forfeiture liability under this standard.

There may well be room for inference on the part of the trier of fact in this case, if not on the present record, on such additional record as could be compiled on remand, that respondent subcontractor knew or had reason to believe that the prime contractor would assemble and forward finished products to the Government at routine and regular intervals. Nor would it be unforeseeable under such a set of circumstances that the prime contractor would regularly invoice the Government for the customary progress payments. I am unwilling to accept the flat conclusion that it was "wholly beyond" the subcontractor's ability to foresee that 35 false claims would be generated by his fraud. Evidence such as the terms of the prime contract, and the subcontract, the sub-

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[6] This is in contrast, however, with the second and third clauses of § 5438, which also go to nonmilitary persons. The number of imposable forfeitures in the second clause appears to turn on the number of false bills, certificates, affidavits, etc., made or used, or caused to be made or used, "for the purpose of obtaining . . . the payment or approval" of a false claim. The act prohibited by the third clause is the entry into a conspiracy to defraud the Government by obtaining the payment of a false claim. See text quoted, *ante*, at 306 n. 1.

contractor's experience in business generally and in Government procurement particularly, and the closeness of the working relationship between the subcontractor and the prime contractor could well be relevant to such an inquiry. But the fact that the subcontractor loses "control" over the actual number of false claims his actions have caused to be submitted to the Government, once the prime contractor has been tricked into paying for fraudulent goods, cannot be of controlling significance if he could have foreseen the number or even the order of magnitude of the claims which would be ultimately submitted by the prime contractor. Given a statute which punishes intentional deception, deception which is abundantly made out on this record, I cannot agree with the Court's sharply restricted test for determining the number of forfeitures for which these respondents are liable.

DOVE *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75–543. Decided January 19, 1976

Petitioner's death pending review by certiorari requires dismissal of petition. *Durham* v. *United States,* 401 U. S. 481, overruled. Certiorari dismissed. See 506 F. 2d 1398.

PER CURIAM.

The Court is advised that the petitioner died at New Bern, N. C., on November 14, 1975. The petition for certiorari is therefore dismissed. To the extent that *Durham* v. *United States,* 401 U. S. 481 (1971), may be inconsistent with this ruling, *Durham* is overruled.

It is so ordered.

MR. JUSTICE WHITE dissents.

FEDERAL POWER COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75–584. Decided January 19, 1976

Because of a claimed natural gas shortage, respondent pipeline company submitted to the Federal Power Commission (FPC) for approval an interim curtailment plan which resulted from a settlement agreement between respondent company and its customers providing for allocation of natural gas supplies among the customers during shortage periods and a monetary compensation scheme whereby customers receiving more gas than the systemwide average would compensate customers receiving less. The FPC rejected the plan on the ground that the compensation scheme would violate various provisions of the Natural Gas Act. Thereafter, respondent company and several of its customers sought review of the FPC's order. The Court of Appeals entered an interlocutory order directing the FPC to investigate the company's claims of reduced gas reserves and to report the result of the investigation directly to the court. *Held:*

1. The Court of Appeals' order, although interlocutory, is properly reviewable by this Court on certiorari pursuant to 28 U. S. C. § 1254 (1), since its effect is immediate and irreparable and any review by the Court of its propriety must be immediate to be meaningful.

2. An actual gas shortage is a necessary predicate to the FPC's assertion of authority under its transportation jurisdiction to approve curtailment of gas already contracted for, and the Court of Appeals could properly conclude that the FPC would have abused its discretion had it approved curtailment plans absent evidence whereby it "could have reasonably believed" the shortage to exist, and that "substantial evidence" in the record is necessary to support any such finding.

3. The Court of Appeals, however, exceeded its reviewing authority in ordering the gas shortage investigation, since § 19 (b) of the Natural Gas Act providing for judicial review of FPC

decisions contemplates a mode of review that considers only the agency's decision and the evidence on which it is based and not some new record initially made by the reviewing court. If new evidence is needed, the case must be remanded so that the agency can decide in its discretion how best to develop the needed data and how its prior decision should be modified in the light thereof.

4. Since it cannot be determined from the record whether evidence regarding respondent company's actual gas shortage is absolutely essential for the Court of Appeals' review, that court is free on remand either to consider the merits of the issues presented by the compensation scheme and only thereafter to deal with the adequacy of the record evidence as to the shortage, or immediately to remand the case to the FPC for the required inquiry.

5. In light of the immediacy of the gas shortage problem, the protracted nature of the review proceedings, and the potential importance of a resolution on the merits of the compensation scheme issues, the Court of Appeals should give priority consideration to the case on remand.

Certiorari granted; 171 U. S. App. D. C. 66, 518 F. 2d 459, vacated and remanded.

PER CURIAM.

The Federal Power Commission seeks certiorari from an interlocutory order of the Court of Appeals for the District of Columbia Circuit, which defers that court's review of the Commission order at issue pending completion of a certain evidentiary investigation by the Commission directed by the court. The Commission challenges the authority of the Court of Appeals to order the investigation under the statutory review provision involved, § 19 (b) of the Natural Gas Act, 52 Stat. 831, as amended, 15 U. S. C. § 717r (b), and, in any event, contends that the Court of Appeals abused its discretion in the circumstances of this case.

The underlying case involves plans for coping with a natural gas shortage being experienced by respondent Transcontinental Gas Pipe Line Corp. (Transco). The

shortage is said to require curtailment of contracted natural gas deliveries by Transco to its customers during periods of high demand. The curtailment plans concern methods of allocating the shortfall among the various customers. The curtailment plan immediately at issue was submitted by Transco to cover the period of November 1974 to November 1975. This interim plan was filed in September 1974, and was the result of a settlement agreement negotiated between Transco and its various customers. The agreement provided for a plan of allocation of natural gas supplies among Transco's customers during periods of shortage, and a monetary compensation scheme under which customers receiving more gas than the systemwide average would compensate customers who received less natural gas than the average. The Commission rejected the proposed plan, determining that the compensation scheme would be violative of the Natural Gas Act. The Commission held that the compensation scheme would violate (1) § 4 (a) of the Act, 15 U. S. C. § 717c (a), which requires a pipeline's jurisdictional rate to be based on the pipeline's cost of service plus a reasonable rate of return; (2) § 4 (b) of the Act, 15 U. S. C. § 717c (b), which prohibits undue discrimination in rates among similarly situated customers; and (3) § 7 (c) of the Act, 15 U. S. C. § 717f (c), which requires persons engaging in resales of natural gas in interstate commerce first to obtain a certificate of public convenience and necessity.

Thereafter, Transco and several of the parties to the settlement agreement sought review of the Commission's determination.[1] Following oral argument on the peti-

[1] Although neither the petitioning Commission nor the two respondents who have filed responses to the petition for certiorari have addressed the issue, it appears that the underlying controversy is not now moot even though it concerns an interim plan covering a

tion for review, the Court of Appeals, "desiring to be more fully informed about the 'crisis' on the Transco system before reviewing questions pertaining to its solution," entered an order *sua sponte* directing the parties to submit certain information concerning Transco's natural gas reserves. After receiving responses to this order, and noting the refusal of the Commission to certify the accuracy of the data supplied by Transco regarding its reserves of natural gas, the court directed the parties to show cause why it should not order the Commission to conduct an immediate investigation of Transco's claim of reduced reserves. Thereafter, the Court of Appeals, observing that evidence of "actual shortage both underlies the concept of curtailment and justifies its application," issued the proposed order. That order directed the Commission to complete and report to the court an investigation "of Transco's claims of reduced reserves by immediate subpoena of Transco's books and records pertaining to all gas supplies in which it has any legal interest . . . and by field investigation [which] has determined the extent of the reduced reserves and the bona fides of Transco and its suppliers in meeting their past and future contract commitments. . . ." The court further directed that its decision reviewing

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period of time that has by now expired. The Court of Appeals earlier granted a motion by Transco and ordered the interim plan into effect pending that court's review of the Commission's order disallowing the plan. *Consolidated Edison Co.* v. *FPC*, 167 U. S. App. D. C. 134, 143, 511 F. 2d 372, 381 (1974). The court ordered that the compensation payments under the plan be paid into an escrow account pending review of the Commission's determination that the compensation scheme was unlawful. *Ibid.* Therefore, it appears that at the least the disposition of these payments into the escrow account will be affected by the Court of Appeals' ultimate judgment on the merits of the case.

the Commission's order would be deferred pending the investigation and report, and that the investigation and report should be made by the Commission within 30 days.

It is this interlocutory order for which the Commission petitions for review by this Court. The Commission first argues that the Court of Appeals has overstepped the bounds of its reviewing authority in ordering this investigation by the Commission, and that in doing so the court has unwarrantedly interfered with the internal functional autonomy of an independent administrative agency. Additionally, the Commission argues, the Court of Appeals has abused its discretion in ordering the factual inquiry by the Commission in the circumstances presented by this case. The Commission maintains that the extent of Transco's natural gas shortage is not material to the legal issues—concerning the lawfulness of the proposed compensation scheme—which presently confront the Court of Appeals. This is said to be particularly true where, as here, the Commission has *disapproved* the proposed interim plan for dealing with the alleged shortage of gas.[2] Finally, the Commission argues that it is impossible to comply with the order, as such a complex investigation would require much longer than the 30 days allowed.

First. We agree with the Commission that the challenged order, although interlocutory in nature, is prop-

[2] This argument appears to accord with the views of Judge MacKinnon which are set forth in a separate statement accompanying the challenged order. Judge MacKinnon expressed the view that the extent of the shortage is "peripheral," although "not wholly irrelevant" to the legal issues confronting the Court of Appeals. He indicated that he would instead first reach the merits, affirm the order of the Commission, and then direct that the Commission make the complex factual inquiry regarding the shortage "prior to passing on any subsequent curtailment plan."

erly reviewable by this Court pursuant to 28 U. S. C. § 1254 (1). Clearly the effect of the order is immediate and irreparable, and any review by this Court of the propriety of the order must be immediate to be meaningful.

Second. We agree with the Court of Appeals that the existence of an actual shortage of gas supplies forms the factual predicate necessary to the Commission's assertion of authority under its transportation jurisdiction, § 1 (b) of the Act, 15 U. S. C. § 717 (b), to approve the curtailment of gas already contracted for. *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621 (1972). Certainly that court could properly conclude that the Commission would have abused its discretion had it approved curtailment plans in the absence of evidence whereby it "could have reasonably believed" the shortage to exist, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 416 (1971), and that "substantial evidence" in the record is necessary to support any such finding by the Commission.

Third. We are of the view, however, that the Court of Appeals overstepped the bounds of its reviewing authority in issuing the order presently before us. First, we have consistently expressed the view that ordinarily review of administrative decisions is to be confined to "consideration of the decision of the agency . . . and of the evidence on which it was based." *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709, 714–715 (1963). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U. S. 138, 142 (1973). If the decision of the agency "is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration." *Id.*, at 143. Clearly it is this mode of review that is contem-

plated by the statute providing for judicial review of Commission decisions, § 19 (b) of the Act, 15 U. S. C. § 717r (b).[3] Secondly, although we have recognized that

[3] Section 19 (b) of the Natural Gas Act provides:

"Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia [Circuit], by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review

a court reviewing decisions of the Federal Power Commission sits as a court vested with equity powers and "may authorize the Commission in proper cases to take new evidence," *Mobil Oil Corp.* v. *FPC,* 417 U. S. 283, 311–312 (1974), it is nevertheless true that ordinarily this will require a remand to the agency in order that it can exercise its administrative discretion in deciding how, in light of internal organizational considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops. Certainly this is the procedure contemplated by the review statute, which provides that the Commission "may modify its findings as to the facts by reason of the additional evidence so taken," and that "such modified or new findings, . . . if supported by substantial evidence, shall be conclusive . . . ." 15 U. S. C. § 717r (b). At least in the absence of substantial justification for doing otherwise,[4] a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures, and time dimension of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of the new evidence by the agency. Such a procedure clearly runs the risk of "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." *SEC* v. *Chenery Corp.,* 332 U. S. 194, 196 (1947). "The Court, it is true, has power 'to affirm, modify, or set aside' the order of the

by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28."

[4] We do not find the reasons stated by the Court of Appeals, largely that the Commission "has been long on notice" that data supporting the claimed existence of shortage was necessary, to be in the circumstances presented sufficient justification for the court's order.

Commission 'in whole or in part.' . . . But that authority is not power to exercise an essentially administrative function." *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 21 (1952).

Fourth. We are unable to determine with certainty, from this vantage point and on the partial record now before us, whether the evidence regarding Transco's actual shortage with which the instant order is concerned is absolutely essential to a decision by the Court of Appeals on the issues presently before that court for review. Although Judge MacKinnon in his separate statement was apparently of the view that it was not, it is at least conceivable that the Court of Appeals could determine that the lawfulness of the proposed compensation scheme is partially a function of the actual severity of the shortage. Cf. *FPC* v. *Louisiana Power & Light Co., supra.* Accordingly, the court below is free on remand either to proceed to the merits of the issues presented by the compensation scheme and only thereafter deal with the adequacy of the record in regard to the evidence of shortage, or immediately to remand the case to the Commission for the required inquiry. It is apparent that under neither alternative need the Court of Appeals' ability fully and effectively to review the administrative process regarding the implementation of curtailment plans and their underlying factual premises be relinquished.

Fifth. In light of the immediacy of the natural gas shortage problem with which the Commission is attempting to cope, the already protracted nature of review proceedings in this case, and the potential importance of a resolution on the merits of the compensation issues presented by the instant case,[5] swift and priority con-

[5] See *Mississippi Pub. Serv. Comm'n* v. *FPC*, 522 F. 2d 1345 (CA5 1975).

sideration of this case by the Court of Appeals on remand is merited.

Accordingly, the petition for certiorari is granted, the order of the Court of Appeals is vacated, and the case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this case.

Syllabus 423 U. S.

THERMTRON PRODUCTS, INC., ET AL. *v.* HERMANSDORFER, U. S. DISTRICT JUDGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-206. Argued October 7, 1975—Decided January 20, 1976

Title 28 U. S. C. § 1441 (a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction" may be removed by the defendant to the federal district court, and § 1446 provides the removal procedure. Section 1447 (c) provides for remand to the state court on the ground that the case was removed "improvidently and without jurisdiction," and § 1447 (d) imposes a general bar against appellate review of a remand order. After two citizens of Kentucky had brought a damages action against petitioners, an Indiana corporation and its employee, a citizen of Indiana, petitioners removed the action to the Federal District Court under §§ 1441 (a) and 1446. Thereafter respondent, the District Judge, though conceding that petitioners had the statutory right to remove the action to federal court, ordered the case remanded to the state court for trial, solely on the ground that his heavy docket would unjustly delay the plaintiffs from going to trial on the merits. Petitioners then filed in the Court of Appeals an alternative petition for a writ of mandamus or prohibition on the ground that the action had been properly removed and that respondent lacked authority to remand the case on the ground that he had asserted. The Court of Appeals denied the petition after concluding that (1) the District Court had jurisdiction to enter the remand order and (2) the Court of Appeals because of § 1447 (d) had no jurisdiction to review that order. Petitioners concede that § 1447 (d) prohibits appellate review of all remand orders issued pursuant to § 1447 (c), whether erroneous or not, but maintain that the bar does not apply to remand on a ground not authorized by § 1447 (c). *Held:*

1. The District Court exceeded its authority in remanding the case on grounds not permitted by § 1447 (c). Pp. 342–345.

2. Section 1447 (d), when construed as it must be in conjunction with § 1447 (c), does not bar appellate review by mandamus of a remand order made on grounds not specified in § 1447 (c),

there being no indication either in the language or the legislative history of the provision that Congress intended to extend the bar against review to reach remand orders not based on statutory grounds. Pp. 345–352.

3. Here, where the District Court had refused to adjudicate a case, and had remanded it on grounds not authorized by the removal statutes, mandamus was the proper remedy to compel the District Court to entertain the remanded action. Pp. 352–353.

Reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART, J., joined, *post*, p. 353. STEVENS, J., took no part in the consideration or decision of the case.

Frank G. Dickey, Jr., argued the cause and filed a brief for petitioners.

C. Kilmer Combs argued the cause and filed a brief for respondent.

MR. JUSTICE WHITE delivered the opinion of the Court.

The questions in this case are whether a Federal District Judge may remand a properly removed diversity case for reasons not authorized by statute, and, if not, whether such remand order may be remedied by writ of mandamus.

I

On April 9, 1973, two citizens and residents of Kentucky filed an action in a Kentucky state court against Thermtron Products, Inc., an Indiana corporation without office or place of business in Kentucky, and one Larry Dean Newhard, an employee of Thermtron and a citizen and resident of Indiana, seeking damages for injuries arising out of an automobile accident between plaintiffs' automobile and a vehicle driven by Newhard.

Service on the defendants, who are petitioners here, was by substituted service on the Secretary of State of the Commonwealth, pursuant to Kentucky law. Later that month, petitioners removed the cause to the United States District Court for the Eastern District of Kentucky pursuant to 28 U. S. C. §§ 1441 [1] and 1446.[2] The

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[1] Title 28 U. S. C. § 1441 provides:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

"(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

[2] Title 28 U. S. C. § 1446 provides:

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

"(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and

case was assigned a number, and the defendants filed their answer and later proceeded with discovery. On February 5, 1974, respondent judge issued an order in the case which recited that the action "was removed from the Pike Circuit Court, Pike County, Kentucky, on April 30, 1973, pursuant to the provisions of 28 U. S. C. § 1446," that his court had reviewed its entire civil docket and found "that there is no available time in which to try the above-styled action in the foreseeable future" and that an adjudication of the merits of the case would be expedited in the state court. Record 31. The order then called upon the defendants to show cause "why the ends of justice do not require this matter [to] be remanded to the Pike Circuit Court . . . ." *Ibid.* In response to the

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is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

"(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

"(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

"(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court."

order, petitioners asserted that they believed they could not have a fair and impartial trial in the state courts, that the cause had been properly removed pursuant to the applicable statutes, that petitioners had a federal right to have the cause tried in the federal court, that respondent had no discretion to remand the case merely because of a crowded docket, and that there was no other legal ground for the remand.

On March 22, 1974, respondent filed a memorandum opinion and order remanding the case to the Pike Circuit Court. The opinion noted petitioners' contention that they had a "right" to remove the action by properly invoking 28 U. S. C. § 1441, and remarked that "[t]he court must concede that fact." Record 36. That right, the opinion then stated, nevertheless had to be "balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action." *Ibid.* Because of the District Court's crowded docket and because other cases had priority on available trial time,[3] "plaintiffs' right of re-

[3] The condition of respondent's docket and the priority for trial of cases on the docket were explained by respondent in the memorandum opinion and order, Record 36–37:

"At the close of business on February 28, 1974 there were pending on the dockets for which this Court has primary responsibility a total of eighty (80) criminal actions and three hundred ninety-four (394) civil actions. These cases have been assigned various priorities. The first priority is granted criminal actions. Social Security and Black Lung cases* have a priority second only to criminal cases. *Webb* v. *Richardson,* 472 F. 2d 529, 538 (6th Cir. 1972). A third priority is granted those actions in which the United States is a party. The lowest priority, as a matter of necessity, is assigned private civil actions. Consequently, the period between the filing of such actions and the time in which they are assigned for trial must, regrettably, continually be extended."

"*At the present time the Eastern District of Kentucky is experiencing an influx of Black Lung related actions. The Department

dress is being severely impaired," which "would not be the case if the cause had not been removed from the state courts." *Id.*, at 37. Remarking that the purpose of the removal statute was to prevent prejudice in local courts and being of the view that petitioners had made no showing of possible prejudice that might follow from remand, respondent then ordered the case remanded.[4]

Petitioners then filed in the Court of Appeals for the Sixth Circuit their alternative petition for writ of mandamus or prohibition, requesting relief on the ground that the action had been properly removed and that respondent had no authority or discretion whatsoever to remand the case on the ground asserted by him. Based on the petition and respondent's response, the Court of Appeals denied the petition after concluding (1) that the District Court had jurisdiction to enter the order for remand and (2) that the Court of Appeals

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of Health, Education and Welfare predicts that a total in excess of four thousand (4,000) of these actions will ultimately be filed in this District."

[4] Apparently respondent entered similar orders of remand in other diversity cases removed to his court. Petitioners stated in their petition for a writ of mandamus in the Court of Appeals that they believed "upon information only, that the Respondent herein has entered similar Orders of Remand in approximately 28 other actions, which actions either were removed to the United States District Court for the Eastern District of Kentucky, at Pikeville, in 1973, or which actions constitute all cases removed to said Court during the year 1973." *Id.*, at 8–9. At oral argument before this Court, petitioners' counsel stated that during 1973, 14 cases had been removed from the Pike Circuit Court to respondent's court and that in every case respondent had issued orders to defendants to show cause why the cases should not be remanded to the state court. Petitioners' counsel further stated that respondent had entered orders of remand to the state court in all but two of those cases. Tr. of Oral Arg. 8.

had no jurisdiction to review that order or to issue mandamus because of the prohibition against appellate review contained in 28 U. S. C. § 1447 (d). We granted the petition for certiorari, 420 U. S. 923 (1975), and now reverse.

II

Title 28 U. S. C. § 1441 (a) provides that unless otherwise expressly provided by Act of Congress, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction," may be removed by the defendant to the district court of the United States.[5] Section 1446 provides the procedure for removal;[6] and a case removed under that section may be remanded only in accordance with § 1447 which governs procedure after removal. Section 1447 (c) provides in part:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs."

The following section, § 1447 (d), generally forbids review of remand orders:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it is removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."[7]

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[5] See n. 1, *supra*.

[6] See n. 2, *supra*.

[7] Title 28 U. S. C. § 1443 provides:

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the

It is unquestioned in this case and conceded by petitioners that this section prohibits review of all remand orders issued pursuant to § 1447 (c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. This has been the established rule under § 1447 (d) and its predecessors stretching back to 1887. See, *e. g., In re Pennsylvania Co.*, 137 U. S. 451 (1890); *Ex parte Matthew Addy S. S. Co.*, 256 U. S. 417 (1921); *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937); *United States* v. *Rice*, 327 U. S. 742 (1946). If a trial judge purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," his order is not subject to challenge in the court of appeals by appeal, by mandamus, or otherwise.

The issue before us now is whether § 1447 (d) also bars review where a case has been properly removed and the remand order is issued on grounds not authorized by § 1447 (c). Here, respondent did not purport to proceed on the basis that this case had been removed "improvidently and without jurisdiction." Neither the propriety of the removal nor the jurisdiction of the court

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district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

Title 28 U. S. C. § 1447 (d), as amended in 1949, was further amended in 1964 to provide expressly for review "by appeal or otherwise" of orders remanding cases that had been removed pursuant to § 1443. § 901 of Civil Rights Act of 1964, 78 Stat. 266. See *Georgia* v. *Rachel*, 384 U. S. 780 (1966); *City of Greenwood* v. *Peacock*, 384 U. S. 808 (1966).

was questioned by respondent in the slightest.[8] Section 1447 (c) was not even mentioned. Instead, the District Court's order was based on grounds wholly different from those upon which § 1447 (c) permits remand. The determining factor was the District Court's heavy docket, which respondent thought would unjustly delay plaintiffs in going to trial on the merits of their action. This consideration, however, is plainly irrelevant to whether the District Court would have had jurisdiction of the case had it been filed initially in that court, to the removability of a case from the state court under § 1441, and hence to the question whether this cause was removed "improvidently and without jurisdiction" within the meaning of the statute.

Removal of cases from state courts has been allowed since the first Judiciary Act, and the right to remove has never been dependent on the state of the federal court's docket. It is indeed unfortunate if the judicial manpower provided by Congress in any district is insufficient to try with reasonable promptness the cases properly filed in or removed to that court in accordance with the applicable statutes. But an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason. *McClellan* v. *Carland,* 217 U. S. 268

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[8] So far as the record reveals, it has not been questioned in this case that the cause is between citizens of different States, that it involves a claim of over $10,000 exclusive of interest and costs, that it is within the so-called diversity jurisdiction of the District Court and that it could have been initially filed in the District Court pursuant to 28 U. S. C. § 1331. It also seems common ground that there is no express statutory provision forbidding the removal of this action and that the cause was timely removed in strict compliance with 28 U. S. C. § 1446.

(1910); *Chicot County* v. *Sherwood,* 148 U. S. 529 (1893); *Hyde* v. *Stone,* 20 How. 170 (1858).

We agree with petitioners: The District Court exceeded its authority in remanding on grounds not permitted by the controlling statute.[9]

III

Although the Court of Appeals, erroneously we think, held that the District Court had jurisdiction to enter its remand order, the Court of Appeals did not mention § 1447 (c), did not suggest that the District Court had proceeded under that section, properly or improperly, and did not itself suggest that this case was not removable under § 1441 or that it had been improvidently removed from the state court for want of jurisdiction or otherwise. In the face of petitioners' position that the remand was for reasons not authorized by the statute, the Court of Appeals acted solely on the ground that under § 1447 (d) it had no jurisdiction to entertain a petition for writ of mandamus challenging the remand order issued by respondent in this case.

We disagree with that conclusion. Section 1447 (d) is not dispositive of the reviewability of remand orders in and of itself. That section and § 1447 (c) must be construed together, as this Court has said of the predecessors to these two sections in *Employers Reinsurance Corp.* v. *Bryant, supra,* at 380–381, and *Kloeb* v. *Armour & Co.,* 311 U. S. 199, 202 (1940). These provisions, like their predecessors, "are *in pari materia* [and] are to be

[9] Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute. *Romero* v. *ITE Imperial Corp.,* 332 F. Supp. 523, 526 (PR 1971); *Isbrandtsen Co.* v. *Dist. 2, Marine Engineers Ben. Assn.,* 256 F. Supp. 68, 77 (EDNY 1966); *Davis* v. *Joyner,* 240 F. Supp. 689, 690 (EDNC 1964); *Vann* v. *Jackson,* 165 F. Supp. 377, 381 (EDNC 1958).

construed accordingly rather than as distinct enactments . . . ." *Employers Reinsurance Corp.* v. *Bryant, supra,* at 380. This means that only remand orders issued under § 1447 (c) and invoking the grounds specified therein—that removal was improvident and without jurisdiction—are immune from review under § 1447 (d).

Section 1447 (d) has its roots in the Act of Mar. 3, 1887, 24 Stat. 552. Prior to 1875, orders of remand were not reviewable by appeal or writ of error for want of a final judgment. *Railroad Co.* v. *Wiswall,* 23 Wall. 507 (1875). Section 5 of the Judiciary Act of 1875, 18 Stat. 472, provided that if the trial court became satisfied at any time during the pendency of a case brought in or removed to that court that the case did not really or substantially involve a dispute or controversy properly within its jurisdiction, the action was to be either dismissed or remanded to the court from which it was removed as justice might require. The section expressly provided that the order dismissing or remanding the cause was to be reviewable on writ of error or appeal.[10] The Act of Mar. 3, 1887, however, while not disturbing

[10] Section 5 of the Judiciary Act of 1875, 18 Stat. 472, provided: "That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

the provision for dismissal or remand for want of jurisdiction, not only repealed the provision in § 5 of the 1875 Act providing for appellate review of remand orders but contained a provision that "improperly removed" cases should be remanded and that "no appeal or writ of error from the decision of the circuit court *so remanding* such cause shall be allowed." 24 Stat. 553.[11] (Emphasis added.)

These provisions for the disposition of removed cases where jurisdiction was lacking or removal was otherwise improper, together with the prohibition of appellate review, were later included in §§ 28 and 37 of the Judicial Code of 1911, appeared in 28 U. S. C. §§ 71 and 80 (1946 ed.), 36 Stat. 1094, 1098, and endured until 1948 [12] when

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[11] The Act of Mar. 3, 1887, c. 373, 24 Stat. 553, provided in part:

" 'Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.' "

[12] Title 28 U. S. C. § 71 (1946 ed.), which was effective until the 1948 revision, provided in part:

"Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed."

Title 28 U. S. C. § 80 (1946 ed.), which was also effective until the 1948 revision, provided:

"If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not

28 U. S. C. § 1447 was enacted—minus, however, the prohibition against appellate review. The omission was corrected in 1949 when the predecessor of the present subsection (d) came into being.[13]

Until 1948, then, district courts were authorized to remand cases over which they had no jurisdiction or which had been otherwise "improperly" removed, and district court orders "so remanding" were not appealable. It was held that a case remanded for want of jurisdiction under § 80, which itself contained no prohibition of appellate review, was an "improperly" removed case under § 71 and hence subject to the reviewability bar of that section. *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937). But under the plain language of § 71, a case was "so remanded" and within the reviewability prohibition only if it had been *improperly* removed. Insofar as we are advised, no case in this Court ever held that § 71 prohibited appellate review by mandamus of a remand order not purporting to be based on the statutory ground.[14]

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really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

[13] As amended in 1949, 28 U. S. C. § 1447 (d) (1946 ed., Supp. III) provided:

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."

The subsection took its present form in 1964, when Congress amended the subsection to provide for review of cases removed pursuant to 28 U. S. C. § 1443. See n. 7, *supra*.

[14] *Kloeb* v. *Armour & Co.*, 311 U. S. 199 (1940), upon which respondent relies, plainly did not do so. There, various suits were

Sections 1447 (c) and (d) represent the 1948 recodification of §§ 71 and 80. They were intended to restate the prior law with respect to remand orders and their

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filed in the Ohio state courts against Armour and an individual. Armour's removal petitions, filed in the state courts in accordance with the then-controlling procedure and asserting the right to remove because of a separable controversy between it and the plaintiffs, were denied by the trial court. The Ohio Supreme Court reversed, holding that the controversy with Armour was separable and that its removal petitions should have been granted. The trial court complied, and the cases were removed; but a motion to remand was then granted in the Federal District Court on the ground that in its view there was no separable controversy and hence no federal jurisdiction. The Court of Appeals for the Sixth Circuit granted Armour's mandamus petition, holding that the District Court had no power to determine the separable-controversy issue because that question had been finally determined by the Ohio Supreme Court. The Court of Appeals deemed inapplicable the prohibition against review by appeal or mandamus where the action of the District Court flouted not only the doctrine of res judicata but also the statutes directing courts to give full faith and credit to the decisions of state tribunals. The view of the Court of Appeals was that the prohibition against review contained in § 71 barred review of erroneous decisions but not of those beyond the power of the District Court. In reversing, this Court could not agree with "[t]he suggestion that the federal district court had no power to consider the entire record and pass upon the question of separability, because this point had been finally settled by the Supreme Court of Ohio." 311 U. S., at 204. Although the Ohio Supreme Court had held that the state trial court should have relinquished jurisdiction, the federal court was required by the controlling statute to consider its own jurisdiction, which it had proceeded to do in determining that "the controversy was not within the jurisdiction of that court" and that the case should be remanded. The remand order was thus deemed by this Court to be strictly within the power conferred upon the District Court by the statute, inasmuch as it was based on a determination of jurisdiction over the case. Mandamus was therefore barred by § 71.

It is apparent that *Kloeb* does not control this case. *Kloeb* did not hold that mandamus would not lie to challenge an order based

reviewability.[15] There is no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by the statute.

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upon grounds that the District Court was not empowered by statute to consider. To the contrary, *Kloeb* held that the District Court was not bound by the state court's jurisdictional determination, and that the District Court's remand order, entered for want of jurisdiction in compliance with the controlling statute, was not reviewable by mandamus. In contrast to *Kloeb*, where the remand for want of jurisdiction was expressly authorized by the statute, here the District Court did not purport to comply with the removal and remand statutes at all. Its remand was on wholly unauthorized grounds.

[15] When the Judicial Code was revised in 1948, 28 U. S. C. § 1447 (e) (1946 ed., Supp. II) (now § 1447 (c)) provided:

"If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case." There was no express provision, as there had been under former § 71, prohibiting review of such order. The Reviser's Note stated:

"Subsection (e) [now subsec. (c)] is derived from sections 71 and 80 of title 28, U. S. C., 1940 ed. Such subsection is rewritten to eliminate the cumbersome procedure of remand." Note following 28 U. S. C. § 1447.

There was no intent to change the prior law substantively, although the prohibition of appellate review of remand orders contained in § 71 of the old Code was inexplicably omitted. The omission was quickly rectified by the 1949 amendments to the Code. Section 1447 (c) (1946 ed., Supp. III), which had been § 1447 (e) (1946 ed., Supp. II) in the 1948 revision, took its present form and § 1447 (d) (1946 ed., Supp. III) was enacted. The House Report on the 1949 amendments explained the addition of § 1447 (d):

"This section strikes out subsections (c) and (d) of section 1447 of title 28, U. S. C., as covered by the Federal Rules of Civil Procedure, and adds a new subsection to such section 1447 to remove any doubt that the former law as to the finality of an order of remand to a State court is continued." H. R. Rep. No. 352, 81st Cong., 1st Sess., 15.

The plain intent of Congress, which was accomplished with the 1949

There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, *United States* v. *Rice*, 327 U. S., at 751, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447 (c), whether or not that order might be deemed erroneous by an appellate court. But we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute. That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447 (d).

In so holding we neither disturb nor take issue with the well-established general rule that § 1447 (d) and its

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amendment, was to recodify the pre-1948 law without material change insofar as the provisions of §§ 71 and 80 of the old Code here relevant were concerned. That the word "improperly" in the old law was changed to "improvidently" in § 1447 (c) (1946 ed., Supp. III) with reference to the criteria for remanding cases removed from state and federal court is of no moment. "[N]o changes of law or policy are to be presumed from changes of language in the [1948] revision [of the Judicial Code] unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmirra Corp.*, 353 U. S. 222, 227 (1957) (footnote omitted). What this Court said in *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937), with respect to the *in pari materia* construction of §§ 71 and 80 of the pre-1948 Judicial Code is equally true today of §§ 1447 (c) and (d) in light of the identical substantive content of the two sets of statutory provisions.

predecessors were intended to forbid review by appeal or extraordinary writ of any order remanding a case on the grounds permitted by the statute. But this Court has not yet construed the present or past prohibition against review of remand orders so as to extinguish the power of an appellate court to correct a district court that has not merely erred in applying the requisite provision for remand but has remanded a case on grounds not specified in the statute and not touching the propriety of the removal. We decline to construe § 1447 (d) so woodenly as to reach that result now.

IV

There remains the question whether absent the bar of § 1447 (d) against appellate review, the writ of mandamus is an appropriate remedy to require the District Court to entertain the remanded action. The answer is in the affirmative.

A "traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943); *Ex parte Peru*, 318 U. S. 578, 584 (1943); *Bankers Life & Cas. Co.* v. *Holland*, 346 U. S. 379, 382 (1953). "Repeated decisions of this Court have established the rule . . . that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause," *Insurance Co.* v. *Comstock*, 16 Wall. 258, 270 (1873), or to require "a Federal court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same." *McClellan* v. *Carland*, 217 U. S., at 280.

In accordance with the foregoing cases, this Court has declared that because an order remanding a removed

action does not represent a final judgment reviewable by appeal, "[t]he remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done." *Railroad Co.* v. *Wiswall,* 23 Wall., at 508. Absent statutory prohibitions, when a remand order is challenged by a petition for mandamus in an appellate court, "the power of the court to issue the mandamus would be undoubted." *In re Pennsylvania Co.,* 137 U. S., at 453. There is nothing in our later cases dealing with the extraordinary writs that leads us to question the availability of mandamus in circumstances where the district court has refused to adjudicate a case, and has remanded it on grounds not authorized by the removal statutes. See *Will* v. *United States,* 389 U. S. 90 (1967); *Schlagenhauf* v. *Holder,* 379 U. S. 104 (1964); *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957); *McCullough* v. *Cosgrave,* 309 U. S. 634 (1940); *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701 (1927). On the contrary, these cases would support the use of mandamus to prevent nullification of the removal statutes by remand orders resting on grounds having no warrant in the law.

The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE STEWART join, dissenting.

The Court begins its discussion in this case by asking the wrong questions, and compounds its error by arriving at the wrong answer to at least one of the questions thus posed. The principal, and in my view only, issue pre-

sented for review is whether the Court of Appeals was correct in concluding that it was without jurisdiction to review the order of remand entered by the District Court for the Eastern District of Kentucky. If no jurisdiction existed, it of course follows that there was no power in the Court of Appeals to examine the merits of petitioners' contentions that the order of remand exceeded respondent's authority, and that its order denying relief must be affirmed. *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379 (1884). As I think it plain that Congress, which has unquestioned authority to do so, *Sheldon* v. *Sill,* 8 How. 441 (1850), has expressly prohibited the review sought by petitioners, I dissent.

I

The Court of Appeals not unreasonably believed that 28 U. S. C. § 1447 (d) means what it says. It says:

> "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."

Nor was the Court of Appeals confronted with a question of first impression. As the Court recognizes, the limitation found in § 1447 (d) has remained substantially unchanged since its enactment in 1887, and this Court has consistently ruled that the provision prohibits any form of review of remand orders.

Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction extended by Congress works a significant interference in the conduct of litigation commenced in state court. While Congress felt that making available a federal forum in appropriate instances justifies some such interruption and delay, it obviously

thought it equally important that when removal to a federal court is not warranted the case should be returned to the state court as expeditiously as possible. If this balanced concern is disregarded, federal removal provisions may become a device affording litigants a means of substantially delaying justice.

It is clear that the ability to invoke appellate review, even if ultimately unavailing on the merits, provides a significant opportunity for additional delay. Congress decided that this possibility was an unacceptable source of additional delay and therefore made the district courts the *final* arbiters of whether Congress intended that specific actions were to be tried in a federal court.

I do not doubt that the district courts may occasionally err in making these decisions, and certainly Congress was not unaware of these probabilities. All decisionmakers err from time to time, and judicial systems frequently provide some review to remedy some of those errors. But such review is certainly not compelled. Congress balanced the continued disruption and delay caused by further review against the minimal possible harm to the party attempting removal—who will still receive a trial on the merits before a state court which cannot be presumed to be unwilling or unable to afford substantial justice—and concluded that no review should be permitted in these cases. Congress has explicitly indicated its intent to achieve this result; indeed "[i]t is difficult to see what more could be done to make the action of [remand] final, for all the purposes of the removal, and not the subject of review . . . ." *Morey* v. *Lockhart,* 123 U. S. 56, 57 (1887). Yet the Court today holds that Congress did not mean what it so plainly said.

The majority attempts to avoid the plain language of § 1447 (d) by characterizing the bar to review as limited to only those remand orders entered pursuant

to the directive of § 1447 (c), *i. e.*, those cases "removed improvidently and without jurisdiction." But such a crabbed reading of the statute ignores the undoubted purpose behind the congressional prohibition. If the party opposing a remand order may obtain review to litigate whether the order was properly pursuant to the statute, his ability to delay and to frustrate justice is wide ranging indeed. By permitting such a result here, the Court effectively undermines the accepted rule established by Congress and adhered to for almost 90 years.

Nor is it any more than a naive hope to suppose, as the Court apparently does, that the effect of today's decision will be limited to the unique circumstances of this case. According to the Court, this case is beyond the reach of § 1447 (d) by virtue of the fact that respondent appears to have expressly premised his remand of the case before him on a ground not authorized by Congress, a conclusion purportedly drawn from the face of respondent's order. I may agree, *arguendo*, that an order of remand based upon the clogged docket of the district court and a desire to obtain for the parties a trial in some forum without unreasonable delay, however salutary the motivation behind it, is not within the discretion placed in district courts by Congress. But I fail to see how such an order of remand is any more unauthorized than one where the district court erroneously concludes that an action was removed "improvidently and without jurisdiction." Surely such an error equally contravenes congressional intent to extend a "right" of removal to those within the statute's terms. Yet such an error, until today, never has been thought subject to challenge by appeal or extraordinary writ.

The Court seems to believe the instant case different because it has determined to its satisfaction that respondent's order was not merely an erroneous applica-

tion of § 1447 (c), but was based upon considerations district courts are not empowered to evaluate. I think the Court's purported distinction both unworkable and portentous of the significant impairment of Congress' carefully worked out scheme. The Court relies upon its belief that respondent's order made clear that he was not acting in accordance with § 1447 (c). But there was no requirement that respondent issue any explanation of the grounds for his remand order, and there is no reason to expect that district courts will always afford such explanations. If they do not, is there now jurisdiction in the courts of appeals to compel an explanation so as to evaluate potential claims that the lower court was not acting pursuant to subsection (c)? And what if the district court does state that it finds no jurisdiction, using the rubric of § 1447 (c), but the papers plainly demonstrate such a conclusion to be absurd? Are potential challengers to such an order entitled to seek the aid of the court of appeals, first to demonstrate that the order entered by the lower court was a sham and second to block that order pursuant to today's decision? If the Court's grant of certiorari and order of reversal in this case are to have any meaning, it would seem that such avenues of attack should clearly be open to potential opponents of orders of remand. Yet it is equally clear that such devices would soon render meaningless Congress' express, and heretofore fully effective, directive prohibiting such tactics because of their potential for abuse by those seeking only to delay.

II

The majority's only support for its conclusion that § 1447 (d) no longer means what everyone thought it did is the fact that the predecessor statute provided:

> "Whenever any cause shall be removed from any State court into any district court of the United

> States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed." 28 U. S. C. § 71 (1946 ed.).

In the Court's view the words "so remanding" limited the bar of the prior statute. But this appears a novel construction of the former § 71. If "so remanding" had any limiting effect upon the prohibition against review, it would seem to have restricted the bar to only those cases which a district court determined to have been "improperly removed," as described in the above-quoted sentence. Yet this Court early held that the original prohibition against review of remand orders contained in the Act of Mar. 3, 1887, 24 Stat. 553, applied to bar review not only of remands of removals taken on account of prejudice or local influence—which were not remanded because "improperly removed" but rather pursuant to independent statutory directives requiring the district courts to remand such cases unless they found the opposing party could not obtain justice in the state court—but also of all other remands entered by a district court. Rejecting an argument essentially identical to that advanced by the majority, the Court there held:

> "The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of Congress." *Morey*, 123 U. S., at 58.

In *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937), the Court reiterated its *Morey* holding, ruling that even though the 1911 revision of the Judicial Code had split removal and remand provisions into various sections, the prohibition against review continued to bar all attempts to challenge orders of remand. The majority characterizes *Bryant* as holding that orders of remand issued pursuant to former 28 U. S. C. § 80 (1946 ed.) were cases "improperly removed" within the meaning of § 71 of that Title. *Ante*, at 348. But there is no such statement anywhere in *Bryant*, and that case's clearly stated holding is that the prohibitions against review of remand orders originally enacted in 1887 (and still in effect) "are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter." 299 U. S., at 381. See *United States* v. *Rice*, 327 U. S. 742, 752 (1946).

Even if one were to accept the majority's theory that "so remanding" somehow limited the otherwise universal prohibition against review, there is no such phrase in the current statute. The majority attempts to avoid this by contending that Congress "intended to restate the prior law with respect to remand orders and their reviewability." *Ante*, at 349–350. But this assertion flies in the face of the fact that in revising and codifying Title 28, Congress intended to, and did, work significant changes in prior law governing the Judicial Code and the judiciary. The House Committee made clear that the proposed revisions to the removal provisions effectuated a substantially altered and less cumbersome scheme of removal, in which several prior avenues to federal court had been removed so as to restrict federal jurisdiction. H. R. Rep. No. 308, 80th Cong., 1st Sess., 6, A133–A134.

And with respect to the section at issue here, § 1447, the House Judiciary Committee noted that the new

> "[s]ection consolidates procedural provisions of sections 71, 72, 74, 76, 80, 81 and 83 of title 28, U. S. C. 1940 ed., with important changes in substance and phraseology." *Id.*, at A–136.

It is difficult to see how changes thus described by the Committee can have had no effect on the law.

The Court stresses that the 1949 reintroduction of the bar to review, apparently inadvertently omitted from the 1948 revision of the Judicial Code, was intended to enact the same rule of finality previously in effect. *Ante*, at 350 n. 15. I agree with this interpretation, but not with the Court's application of it. The "former law as to finality" which was continued by subsection (d) is that which had been in effect from 1887. Congress has made all judgments "remanding a cause to the state court final and conclusive." *In re Pennsylvania Co.*, 137 U. S. 451, 454 (1890); *Bryant, supra.* Until today it has not been doubted that

> "Congress, by the adoption of these provisions, . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand . . . ." *United States* v. *Rice, supra,* at 751.

III

Finally, I perceive no justification for the Court's decision to ignore the express directive of Congress in favor of what it personally perceives to be "justice" in this case. If anything is clear from the history of the prohibition against review, it is that Congress decided that po-

tential errors in individual cases did not justify permitting litigants to challenge remand orders. To carry out its policy of avoiding further interruption of the litigation of removed causes, properly begun in state courts, see *Rice, supra,* at 751–752, Congress decided to place final responsibility for implementation of its removal scheme with the district courts. It is not for this Court to strike that balance anew.

Congress has demonstrated its ability to protect against judicial abuses of removal rights when it thought it necessary to do so. See *Georgia* v. *Rachel,* 384 U. S. 780 (1966); *City of Greenwood* v. *Peacock,* 384 U. S. 808 (1966). And it is apparent that the judiciary is not without the means of dealing with such errors as pose some danger of repetition.* Rather than leaving future repetition of cases such as this to Congress, the Court sets out to right a perceived wrong in this individual case. In the process of doing so it reopens an avenue for dilatory litigation which Congress had explicitly closed. Because I am convinced that both the Court of Appeals and this Court are without jurisdiction to consider the merits of petitioners' claims, I would affirm the judgment below.

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*The panel of the Court of Appeals below indicated its intention to report respondent's actions "to the Circuit Council for the Sixth Circuit, which has supervisory powers over the District Court."

RIZZO, MAYOR OF PHILADELPHIA, ET AL. *v.* GOODE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74-942. Argued November 11, 1975—Decided January 21, 1976

Two suits, permitted to proceed as class actions, were brought in District Court under 42 U. S. C. § 1983 by respondents, individuals and organizations, against petitioners, the Mayor of Philadelphia, the Police Commissioner, and others, alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general. The petitioners were charged with misconduct ranging from express authorization or encouragement of the mistreatment to failure to act in such a way as to avoid recurrence. The principal antagonists involved in one case were two police officers, not named as parties, who were found to have violated complainants' constitutional rights in three of eight incidents as to which the District Court made detailed factual findings and as to which a five-day suspension had resulted in one incident and no disciplinary action in another. In the other case, in only two of 28 incidents did the District Court conclude that the police conduct amounted to a deprivation of a federally secured right; it found no police misconduct in four incidents; in another, departmental policy was subsequently changed; and, though the court made no comment on the degree of misconduct occurring in the remainder, there were arguably 16 police violations of citizens' constitutional rights in the year involved. The District Court found, *inter alia*, that the evidence did not establish the existence of any policy on the part of petitioners to violate the constitutional rights of respondent classes but found evidence of departmental discouragement of complaints and a tendency to minimize the consequences of police misconduct. The court found that only a small percentage of policemen commit violations of the rights of Philadelphia residents generally but that such violations could not be dismissed as rare or isolated. Petitioners were directed to draft for the court's approval "a comprehensive program for dealing adequately with civilian complaints" to be formulated in accordance with the court's "guidelines" containing detailed suggestions for

revising the police manuals and procedural rules for dealing with citizens and for changing procedures for handling complaints. On petitioners' appeal the Court of Appeals affirmed. *Held:*

1. The requisite Art. III case or controversy between the individually named respondents and petitioners was lacking, since those respondents' claim to "real and immediate" injury rests not upon what the named petitioners might do to them in the future but upon what one of a small, unnamed minority of policemen might do to them, and thus those respondents lacked the requisite personal stake in the outcome, *i. e.*, the order overhauling police disciplinary procedures. Cf. *O'Shea* v. *Littleton,* 414 U. S. 488. Pp. 371–373.

2. The judgment of the District Court constitutes an unwarranted federal judicial intrusion into the discretionary authority of petitioners to perform their official functions as prescribed by state and local law, and by validating the type of litigation and granting the type of relief involved here, the lower courts have exceeded their authority under 42 U. S. C. § 1983. Pp. 373–381.

(a) The District Court's theory of liability under § 1983 was erroneous, being based on a showing of an "unacceptably high" number of incidents of constitutional dimension when in fact there were only 20 in a city of three million inhabitants with 7,500 policemen, and on the untenable conclusion that even without a showing of direct responsibility for the actions of a small percentage of the police force petitioners' *failure* to act in the face of a statistical pattern was just as enjoinable under § 1983 as was the active conduct enjoined in *Hague* v. *CIO,* 307 U. S. 496, and *Allee* v. *Medrano,* 416 U. S. 802. Pp. 373–376.

(b) Nor can the remedy granted here be upheld on the basis that such equitable relief was sanctioned in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, for here, unlike the situation in that case, where the state authorities had implemented the unconstitutional deprivation, the responsible authorities were not found to have played an affirmative part in any unconstitutional deprivations. Pp. 376–377.

(c) Important principles of federalism militate against the proposition, advanced by respondents, that federal equity power should fashion prophylactic procedures designed to minimize misconduct by a handful of state employees, and the District Court's injunctive order, which sharply limited the police department's

"latitude in the dispatch of its internal affairs," contravened those principles. Pp. 377–380.

506 F. 2d 542, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and POWELL, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 381. STEVENS, J., took no part in the consideration or decision of the case.

James M. Penny, Jr., argued the cause for petitioners. With him on the briefs was *Stephen Arinson.*

Peter Hearn argued the cause for respondents. With him on the brief were *Nancy J. Gellman, Jack J. Levine, William Lee Akers,* and *Harry Lore.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The District Court for the Eastern District of Pennsylvania, after parallel trials of separate actions [1] filed

*Briefs of *amici curiae* urging affirmance were filed by *Peter Van N. Lockwood, David Bonderman, J. Harold Flannery, Paul R. Dimond, William E. Caldwell,* and *Norman J. Chachkin* for the Lawyers' Committee for Civil Rights under Law; by *Barry S. Kohn,* Deputy Attorney General, *Vincent X. Yakowicz,* Solicitor General, and *Robert P. Kane,* Attorney General, for the Commonwealth of Pennsylvania; by *Jack Greenberg, James. M. Nabrit III, Charles Stephen Ralston,* and *Drew S. Days III* for the NAACP Legal Defense and Educational Fund, Inc.; by *Robert M. Landis* and *Samuel T. Swansen* for the Philadelphia Bar Association; by *Anthony G. Amsterdam, Melvin L. Wulf, Joel M. Gora,* and *Sanford J. Rosen* for the American Civil Liberties Union et al.; and by *Frederic L. Ballard* for the Greater Philadelphia Movement.

[1] The complaint in the first action, filed in February 1970 and styled *Goode* v. *Rizzo,* was brought by respondent Goode and two other individuals. The second, filed in September 1970 and styled *COPPAR* v. *Tate,* was brought by 21 individuals and four organizations: the Council of Organizations on Philadelphia Police Accountability and Responsibility (COPPAR), an unincorporated association

in 1970, entered an order in 1973 requiring petitioners "to submit to [the District] Court for its approval a comprehensive program for improving the handling of citizen complaints alleging police misconduct" in accordance with a comprehensive opinion filed together with the order. The proposed program, negotiated between petitioners and respondents for the purpose of complying with the order, was incorporated six months later into a final judgment. Petitioner City Police Commissioner was thereby required, *inter alia,* to put into force a directive governing the manner by which citizens' complaints against police officers should henceforth be handled by the department.[2] The Court of Appeals for

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composed of some 32 constituent community organizations; the Southern Christian Leadership Conference, whose principal office is in Atlanta, Ga.; and the Black Panther Party and the Young Lords Party, unincorporated associations of black citizens and citizens of Spanish origin, respectively. The latter two groups, of which some of the individual complainants in *COPPAR* were members, were ultimately dismissed as parties by the District Court for failure to submit to discovery. Both complaints named as defendants those officials then occupying the offices of Mayor, City Managing Director (who supervises and, with the Mayor's approval, appoints the Police Commissioner), and the Police Commissioner, who has direct supervisory power over the department. Two other police supervisors subordinate to the Commissioner were also named defendants. Both actions were permitted to proceed as class actions, with the individual respondents representing all residents of Philadelphia and an "included" class of all black residents of that city. For a thorough account of the procedural background of this case, see the District Court's opinion. *COPPAR* v. *Rizzo,* 357 F. Supp. 1289 (1973).

[2] A judgment of considerable detail was entered against petitioners, appropriate substitution having been made in 1973 of the current officeholders, including petitioner Rizzo, by then Mayor. See n. 1, *supra.* The existing procedure for handling complaints, embodied in the 2½-page "Directive 127" (March 1967), was expanded to an all-encompassing 14-page document reflecting the revisions suggested by the District Court's "guidelines." See *infra,* at 369–370. Di-

the Third Circuit, upholding the District Court's finding that the existing procedures for handling citizen complaints were "inadequate," affirmed the District Court's choice of equitable relief: "The revisions were . . . ordered because they appeared to have the potential for prevention of future police misconduct." 506 F. 2d 542, 548 (1974). We granted certiorari to consider petitioners' claims that the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions. We find ourselves substantially in agreement with these claims, and we therefore reverse the judgment of the Court of Appeals.

I

The central thrust of respondents' efforts in the two trials was to lay a foundation for equitable intervention, in one degree or another, because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers. This mistreatment was said to have been directed against minority citizens in particular

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rective 127 as revised was ordered by the District Court to be promulgated as such by the Police Commissioner and posted in various public areas, with copies provided anyone who either requested one or inquired generally into the procedure for lodging complaints. A "Citizen's Complaint Report" was ordered drawn up in a format designated by the court, with copies to be printed and available in sufficient quantities to the public in several locations. The department was further ordered to propose a police recruit training manual reflective of the court's "guidelines," with respondents then having the chance to proffer alternative suggestions. Finally, the department was directed to maintain adequate statistical records and annual summaries to provide a basis for the court's "evaluation" of the program as ordered; the court reserved jurisdiction to review petitioners' progress in these areas and to grant further relief as might be appropriate. Pet. for Cert. 20a–37a.

and against all Philadelphia residents in general. The named individual and group respondents were certified to represent these two classes. The principal petitioners here—the Mayor, the City Managing Director, and the Police Commissioner—were charged with conduct ranging from express authorization or encouragement of this mistreatment to failure to act in a manner so as to assure that it would not recur in the future.

Hearing some 250 witnesses during 21 days of hearings, the District Court was faced with a staggering amount of evidence; each of the 40-odd incidents might alone have been the *pièce de résistance* of a short, separate trial. The District Court carefully and conscientiously resolved often sharply conflicting testimony, and made detailed findings of fact,[3] which both sides now accept, with respect to eight of the incidents presented by the *Goode* respondents and with respect to 28 of those presented by *COPPAR*.[4]

The principal antagonists in the eight incidents recounted in *Goode* were Officers DeFazio and D'Amico, members of the city's "Highway Patrol" force. They were not named as parties to the action. The District Court found the conduct of these officers to be violative of the constitutional rights of the citizen complainants in three [5] of the incidents, and further found that complaints to the police Board of Inquiry had resulted in one case in a relatively mild five-day suspension and in another case a conclusion that there was no basis for disciplinary action.

In only two of the 28 incidents recounted in *COPPAR*

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[3] Each of the incidents in *Goode* and *COPPAR* is set out in full detail in the District Court's opinion. 357 F. Supp., at 1294–1316. For present purposes we need only highlight those findings.

[4] See n. 1, *supra*.

[5] Incidents "1" through "3." 357 F. Supp., at 1294–1297.

(which ranged in time from October 1969 to October 1970) did the District Court draw an explicit conclusion that the police conduct amounted to a deprivation of a federally secured right; it expressly found no police misconduct whatsoever in four of the incidents; and in one other the departmental policy complained of was subsequently changed. As to the remaining 21, the District Court did not proffer a comment on the degree of misconduct that had occurred: whether simply improvident, illegal under police regulations or state law, or actually violative of the individual's constitutional rights. Respondents' brief asserts that of this latter group, the facts as found in 14 of them "reveal [federal] violations." [6] While we think that somewhat of an overstatement, we accept it, *arguendo,* and thus take it as established that, insofar as the *COPPAR* record reveals, there were 16 incidents occurring in the city of Philadelphia over a year's time in which numbers of police officers violated citizens' constitutional rights. Additionally, the District Court made reference to citizens' complaints to the police in seven of those 16; in four of which, involving conduct of constitutional dimension, the police department received complaints but ultimately took no action against the offending officers.

The District Court made a number of conclusions of law, not all of which are relevant to our analysis. It found that the evidence did not establish the existence of any policy on the part of the named petitioners to violate the legal and constitutional rights of the plaintiff classes, but it did find that evidence of departmental procedure indicated a tendency to discourage the filing of civilian complaints and to minimize the consequences of police

[6] This textual summary of the District Court's findings with respect to the *COPPAR* incidents is taken from the Brief for Respondents 14–15, and n. 18

misconduct. It found that as to the larger plaintiff class, the residents of Philadelphia, only a small percentage of policemen commit violations of their legal and constitutional rights, but that the frequency with which such violations occur is such that "they cannot be dismissed as rare, isolated instances." *COPPAR* v. *Rizzo,* 357 F. Supp. 1289, 1319 (1973). In the course of its opinion, the District Court commented:

> "In the course of these proceedings, much of the argument has been directed toward the proposition that courts should not attempt to supervise the functioning of the police department. Although, contrary to the defendants' assertions, the Court's legal power to do just that is firmly established, . . . I am not persuaded that any such drastic remedy is called for, at least initially, in the present cases." *Id.,* at 1320.

The District Court concluded by directing petitioners to draft, for the court's approval, "a comprehensive program for dealing adequately with civilian complaints," to be formulated along the following "guidelines" suggested by the court:

> "(1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the 'dos and don'ts' of permissible conduct in dealing with civilians (for example, manifestations of racial bias, derogatory remarks, offensive language, etc.; unnecessary damage to property and other unreasonable conduct in executing search warrants; limitations on pursuit of persons charged only with summary offenses; recording and processing civilian complaints, etc.). (2) Revision of procedures for processing complaints against police, including (a) ready availability of forms for use by civilians in lodging complaints against police

> officers; (b) a screening procedure for eliminating frivolous complaints; (c) prompt and adequate investigation of complaints; (d) adjudication of nonfrivolous complaints by an impartial individual or body, insulated so far as practicable from chain of command pressures, with a fair opportunity afforded the complainant to present his complaint, and to the police officer to present his defense; and (3) prompt notification to the concerned parties, informing them of the outcome." *Id.*, at 1321.

While noting that the "guidelines" were consistent with "generally recognized minimum standards" and imposed "no substantial burdens" on the police department, the District Court emphasized that respondents had no constitutional *right* to improved police procedures for handling civilian complaints. But given that violations of constitutional rights of citizens occur in "unacceptably" high numbers, and are likely to continue to occur, the court-mandated revision was a "necessary first step" in attempting to prevent future abuses. *Ibid.* On petitioners' appeal the Court of Appeals affirmed.

II

These actions were brought, and the affirmative equitable relief fashioned, under the Civil Rights Act of 1871, 42 U. S. C. § 1983. It provides that "[e]very person who, under color of [law] subjects, or causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] suit in equity . . . ." The plain words of the statute impose liability—whether in the form of payment of redressive damages or being placed under an injunction—only for conduct which "subjects, or causes to be subjected" the

complainant to a deprivation of a right secured by the Constitution and laws.

The findings of fact made by the District Court at the conclusion of these two parallel trials—in sharp contrast to that which respondents sought to prove with respect to petitioners—disclose a central paradox which permeates that court's legal conclusions. Individual police officers *not named as parties* to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the *sole* causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, *not* with respect to them, but as to the members of the classes they represented. In sum, the genesis of this lawsuit—a heated dispute between individual citizens and certain policemen—has evolved into an attempt by the federal judiciary to resolve a "controversy" between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals' words, "[appear] to have the potential for prevention of future police misconduct." 506 F. 2d, at 548. The lower courts have, we think, overlooked several significant decisions of this Court in validating this type of litigation and the relief ultimately granted.

A

We first of all entertain serious doubts whether on the facts as found there was made out the requisite Art. III

case or controversy between the individually named respondents and petitioners. In *O'Shea* v. *Littleton*, 414 U. S. 488 (1974), the individual respondents, plaintiffs in the District Court, alleged that petitioners, a county magistrate and judge, had embarked on a continuing, intentional practice of racially discriminatory bond setting, sentencing, and assessing of jury fees. No specific instances involving the individual respondents were set forth in the prayer for injunctive relief against the judicial officers. And even though respondents' counsel at oral argument had stated that some of the named respondents had in fact "suffered from the alleged unconstitutional practices," the Court concluded that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects." *Id.*, at 495–496. The Court further recognized that while "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," the attempt to anticipate under what circumstances the respondents there would be made to appear in the future before petitioners "takes us into the area of speculation and conjecture." *Id.*, at 496–497. These observations apply here with even more force, for the individual respondents' claim to "real and immediate" injury rests not upon what the named petitioners might do to them in the future—such as set a bond on the basis of race—but upon what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman's perception of departmental disciplinary procedures. This hypothesis is even more attenuated than those allegations of future injury found insufficient in *O'Shea* to warrant invocation of federal jurisdiction. Thus, insofar as the individual respondents were concerned, we think they lacked the requisite "per-

sonal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204 (1962), *i. e.*, the order overhauling police disciplinary procedures.

B

That conclusion alone might appear to end the matter, for *O'Shea* also noted that "if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class" which they purport to represent. 414 U. S., at 494. But, unlike *O'Shea*, this case did not arise on the pleadings. The District Court, having certified the plaintiff classes,[7] bridged the gap between the facts shown at trial and the class-wide relief sought with an unprecedented theory of § 1983 liability. It held that the classes' § 1983 actions for equitable relief against petitioners were made out on a showing of an "unacceptably high" number of those incidents of constitutional dimension—some 20 in all—occurring at large in a city of three million inhabitants, with 7,500 policemen.

Nothing in *Hague* v. *CIO*, 307 U. S. 496 (1939), the only decision of this Court cited by the District Court,[8]

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[7] The Court of Appeals noted that petitioners had in their appeal raised no question of the propriety of the class designation under Fed. Rule Civ. Proc. 23. That issue is therefore not before us, and we express no opinion upon it.

[8] *Lankford* v. *Gelston*, 364 F. 2d 197 (CA4 1966), was also cited by the District Court for the proposition that federal courts have the legal power to "supervise the functioning of the police department." 357 F. Supp., at 1320. But the court in *Lankford* intimated no such power, and the facts which confronted it are obviously distinguishable. There, in executing an "evil practice that has long and notoriously persisted in the Police Department," the police, searching over a 19-day period for two black men who murdered one of their ranks, conducted some 300 warrantless searches of private residences in a predominately Negro area "at all hours of

or any other case from this Court, supports such an open-ended construction of § 1983. In *Hague*, the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants there (including the Mayor and the Chief of Police) of excluding and removing the plaintiff's labor organizers and forbidding peaceful communication of their views to the citizens of Jersey City. These policies were implemented "by force and violence" on the part of individual policemen. There was no mistaking that the defendants proposed to continue their unconstitutional policies against the members of this discrete group.

Likewise, in *Allee* v. *Medrano*, 416 U. S. 802 (1974), relied upon by the Court of Appeals and respondents here, we noted:

> "The complaint charged that the enjoined conduct was but one part of a *single plan* by the defendants, and the District Court found a *pervasive pattern of intimidation* in which the law enforcement authorities sought to suppress appellees' constitutional rights. In this blunderbuss effort the police not only relied on statutes . . . found constitutionally deficient, but concurrently exercised their authority

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the day and night" on nothing more than "unverified anonymous [telephone] tips." 364 F. 2d, at 198, and 205 n. 9. This "series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court" arose out of what several experienced police officers testified was a "routine practice" in "serious cases." *Id.*, at 200–201. Injunctive relief under § 1983 was granted against the defendant Police Commissioner because the wholesale raids were the "effectuation of a plan conceived by high ranking [police] officials," a practice which in the interim the defendant had "renounced only obliquely, if at all," and as to which "the danger of repetition has not been removed." *Id.*, at 202, 204.

under valid laws in an unconstitutional manner." *Id.*, at 812 (emphasis added).

The numerous incidents of misconduct on the part of the *named* Texas Rangers, as found by the District Court and summarized in this Court's opinion, established beyond peradventure not only a "persistent pattern" but one which flowed from an intentional, concerted, and indeed conspiratorial effort to deprive the organizers of their First Amendment rights and place them in fear of coming back. *Id.*, at 814–815.

Respondents stress that the District Court not only found an "unacceptably high" number of incidents but held, as did the Court of Appeals, that "when a *pattern* of frequent police violations of rights is shown, the law is clear that injunctive relief may be granted." 357 F. Supp., at 1318 (emphasis added). However, there was no showing that the behavior of the Philadelphia police was different in kind or degree from that which exists elsewhere; indeed, the District Court found "that the problems disclosed by the record . . . are fairly typical of [those] afflicting police departments in major urban areas." *Ibid.* Thus, invocation of the word "pattern" in a case where, unlike *Hague* and *Medrano*, the defendants are not causally linked to it, is but a distant echo of the findings in those cases. The focus in *Hague* and *Medrano* was not simply on the number of violations which occurred but on the common thread running through them: a "pervasive pattern of intimidation" flowing from a deliberate plan by the *named* defendants to crush the nascent labor organizations. *Medrano, supra,* at 812. The District Court's unadorned finding of a statistical pattern is quite dissimilar to the factual settings of these two cases.

The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even

without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Respondents claim that the theory of liability embodied in the District Court's opinion is supported by desegregation cases such as *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). But this case, and the long line of precedents cited therein, simply reaffirmed the body of law originally enunciated in *Brown* v. *Board of Education*, 347 U. S. 483 (1954):

> "Nearly 17 years ago this Court held, in explicit terms, that state-imposed segregation by race in public schools denies equal protection of the laws. At no time has the Court deviated in the slightest degree from that holding or its constitutional underpinnings.
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> . . . . . .
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> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexi-

bility are inherent in equitable remedies." *Swann, supra,* at 11, 15.

Respondents, in their effort to bring themselves within the language of *Swann,* ignore a critical factual distinction between their case and the desegregation cases decided by this Court. In the latter, segregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights. Those against whom injunctive relief was directed in cases such as *Swann* and *Brown* were not administrators and school board members who had in their employ a small number of individuals, which latter on their own deprived black students of their constitutional rights to a unitary school system. They were administrators and school board members who were found by their *own* conduct in the administration of the school system to have denied those rights. Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal "judicial powers may be exercised only on the basis of a constitutional violation," *Swann, supra,* at 16, this case presented no occasion for the District Court to grant equitable relief against petitioners.

C

Going beyond considerations concerning the existence of a live controversy and threshold statutory liability, we must address an additional and novel claim advanced by respondent classes. They assert that given the citizenry's "right" to be protected from unconstitutional exercises of police power, and the "need for protection from

such abuses," respondents have a right to mandatory equitable relief in some form when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct.[9] The scope of federal equity power, it is proposed, should be extended to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees. However, on the facts of this case, not only is this novel claim quite at odds with the settled rule that in federal equity cases "the nature of the violation determines the scope of the remedy," *ibid.*, but important considerations of federalism are additional factors weighing against it. Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951), quoted in *O'Shea* v. *Littleton*, 414 U. S., at 500.

Section 1983 by its terms confers authority to grant equitable relief as well as damages, but its words "allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding." *Giles* v. *Harris*, 189 U. S. 475, 486 (1903) (Holmes, J.). Even in an action between private individuals, it has long been held that an injunction is "to be used sparingly, and only in a clear and plain case." *Irwin* v. *Dixion*, 9 How. 10, 33 (1850). When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal

[9] Brief for Respondents 34–35.

affairs,' *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 896 (1961)," quoted in *Sampson* v. *Murray*, 415 U. S. 61, 83 (1974). The District Court's injunctive order here, significantly revising the internal procedures of the Philadelphia police department, was indisputably a sharp limitation on the department's "latitude in the 'dispatch of its own internal affairs.' "

When the frame of reference moves from a unitary court system, governed by the principles just stated, to a system of federal courts representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief. *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 928 (1975).

So strongly has Congress weighted this factor of federalism in the case of a state criminal proceeding that it has enacted 28 U. S. C. § 2283 to actually deny to the district courts the authority to issue injunctions against such proceedings unless the proceedings come within narrowly specified exceptions. Even though an action brought under § 1983, as this was, is within those exceptions, *Mitchum* v. *Foster*, 407 U. S. 225 (1972), the underlying notions of federalism which Congress has recognized in dealing with the relationships between federal and state courts still have weight. Where an injunction against a criminal proceeding is sought under § 1983, "the principles of equity, comity, and federalism" must nonetheless restrain a federal court. 407 U. S., at 243.

But even where the prayer for injunctive relief does not seek to enjoin the state criminal proceedings themselves, we have held that the principles of equity nonetheless militate heavily against the grant of an injunction except in the most extraordinary circumstances. In *O'Shea* v. *Littleton*, *supra*, at 502, we held that "a major

continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized in the decisions previously noted." And the same principles of federalism may prevent the injunction by a federal court of a state civil proceeding once begun. *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975).

Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as petitioners here. Indeed, in the recent case of *Mayor* v. *Educational Equality League*, 415 U. S. 605 (1974), in which private individuals sought injunctive relief against the Mayor of Philadelphia, we expressly noted the existence of such considerations, saying: "There are also delicate issues of federal-state relationships underlying this case." *Id.*, at 615.

Contrary to the District Court's flat pronouncement that a federal court's legal power to "supervise the functioning of the police department . . . is firmly established," it is the foregoing cases and principles that must govern consideration of the type of injunctive relief granted here. When it injected itself by injunctive decree into the internal disciplinary affairs of this state agency, the District Court departed from these precepts.

For the foregoing reasons the judgment of the Court

of Appeals which affirmed the decree of the District Court is

Reversed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

To be sure, federal-court intervention in the daily operation of a large city's police department, as the Court intimates, is undesirable and to be avoided if at all possible. The Court appropriately observes, however, *ante*, at 367, that what the Federal District Court did here was to engage in a careful and conscientious resolution of often sharply conflicting testimony and to make detailed findings of fact, now accepted by both sides, that attack the problem that is the subject of the respondents' complaint. The remedy was one evolved with the defendant officials' assent, reluctant though that assent may have been, and it was one that the police department concededly could live with. Indeed, the District Court, in its memorandum of December 18, 1973, stated that "the resolution of all the disputed items was more nearly in accord with the defendants' position than with the plaintiffs' position," and that the relief contemplated by the earlier orders of March 14, 1973, see *COPPAR* v. *Rizzo*, 357 F. Supp. 1289 (ED Pa.), "did not go beyond what the defendants had always been willing to accept." App. 190a. No one, not even this Court's majority, disputes the apparent efficacy of the relief or the fact that it effectuated a betterment in the system and should serve to lessen the number of instances of deprival of constitutional rights of members of the respondent classes. What is worrisome to the Court is abstract principle, and, of course, the Court has a right

to be concerned with abstract principle that, when extended to the limits of logic, may produce untoward results in other circumstances on a future day. See *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.).

But the District Court here, with detailed, careful, and sympathetic findings, ascertained the existence of violations of citizens' *constitutional* rights, of a *pattern* of that type of activity, of its likely continuance and recurrence, and of an official indifference as to doing anything about it. The case, accordingly, plainly fits the mold of *Allee* v. *Medrano*, 416 U. S. 802 (1974), and *Hague* v. *CIO*, 307 U. S. 496 (1939), despite the observation, 357 F. Supp., at 1319, that the evidence "does not establish the existence of any overall Police Department *policy* to violate the legal and constitutional rights of citizens, nor to discriminate on the basis of race" (emphasis supplied). I am not persuaded that the Court's attempt to distinguish those cases from this one is at all successful. There must be federal relief available against persistent deprival of federal constitutional rights even by (or, perhaps I should say, particularly by) constituted authority on the state side.

The Court entertains "serious doubts," *ante*, at 371–372, as to whether there is a case or controversy here, citing *O'Shea* v. *Littleton*, 414 U. S. 488 (1974). *O'Shea*, however, presented quite different facts. There, the plaintiff-respondents had alleged a fear of injury from actions that would be subsequent to some future, valid arrest. The Court said:

> "We assume that respondents will conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct said to be followed by petitioners . . . . Under these circumstances, where

> respondents do not claim any constitutional right to engage in conduct proscribed by therefore presumably permissible state laws, or indicate that it is otherwise their intention to so conduct themselves, the threat of injury from the alleged course of conduct they attack is simply too remote to satisfy the case-or-controversy requirement and permit adjudication by a federal court." *Id.*, at 497–498.

Here, by contrast, plaintiff-respondents are persons injured by past unconstitutional conduct (an allegation not made in the *O'Shea* complaint) and fear injury at the hands of the police regardless of whether they have violated a valid law.

To the extent that Part II–A of the Court's opinion today indicates that some constitutional violations might be spread so extremely thin as to prevent any individual from showing the requisite case or controversy, I must agree. I do not agree, however, with the Court's substitution of its judgment for that of the District Court on what the evidence here shows. The Court states that what was shown was minimal, involving only a few incidents out of thousands of arrests in a city of several million population. Small as the ratio of incidents to arrests may be, the District Court nevertheless found a pattern of operation, even if no policy, and one sufficiently significant that the violations "cannot be dismissed as rare, isolated instances." 357 F. Supp., at 1319. Nothing the Court has said demonstrates for me that there is no justification for that finding on this record. The Court's criticism about numbers would be just as forceful, or would miss the mark just as much, with 100 incidents or 500 or even 3,000, when compared with the overall number of arrests made in the city of Philadelphia. The pattern line will appear somewhere. The District Court drew it this side of the number of

proved instances. One properly may wonder how many more instances actually existed but were unproved because of the pressure of time upon the trial court, or because of reluctant witnesses, or because of inherent fear to question constituted authority in any degree, or because of a despairing belief, unfounded though it may be, that nothing can be done about it anyway and that it is not worth the effort. That it was worth the effort is convincingly demonstrated by the result in the District Court, by the affirmance, on the issues before us, by a unanimous panel of the Third Circuit, and by the support given the result below by the Commonwealth of Pennsylvania, the Philadelphia Bar Association, the Greater Philadelphia Movement, and the other entities that have filed briefs as *amici curiae* here in support of the respondents.

The Court today appears to assert that a state official is not subject to the strictures of 42 U. S. C. § 1983 unless he directs the deprivation of constitutional rights. *Ante*, at 375–377. In so holding, it seems to me, the Court ignores both the language of § 1983 and the case law interpreting that language. Section 1983 provides a cause of action where a person acting under color of state law "subjects, or causes to be subjected," any other person to a deprivation of rights secured by the Constitution and laws of the United States. By its very words, § 1983 reaches not only the acts of an official, but also the acts of subordinates for whom he is responsible. In *Monroe* v. *Pape*, 365 U. S. 167 (1961), the Court said that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *id.*, at 187, and:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, pas-

> sion, *neglect,* intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." *Id.*, at 180. (Emphasis added.)

I do not find it necessary to reach the question under what circumstances failure to supervise will justify an award of money damages, or whether an injunction is authorized where the superior has no consciousness of the wrongs being perpetrated by his subordinates.[1] It is clear that an official may be enjoined from consciously permitting his subordinates, in the course of their duties, to violate the constitutional rights of persons with whom they deal. In rejecting the concept that the official may be responsible under § 1983, the Court today casts aside reasoned conclusions to the contrary reached by the Courts of Appeals of 10 Circuits.[2]

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[1] In this regard, however, this Court recently has approved the imposition of criminal liability without "consciousness of wrongdoing" for failure to supervise subordinates. *United States* v. *Park,* 421 U. S. 658 (1975). The concept, thus, is far from novel doctrine.

[2] "Under section 1983, equitable relief is appropriate in a situation where governmental officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct. *Hague* v. *CIO,* 307 U. S. 496 . . . (1939). From a legal standpoint, it makes no difference whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior. In either situation, if the police officials had a duty, as they admittedly had here, to prevent the officers under their direction from committing the acts which are alleged to have occurred during the Convention, they are proper defendants in this action." *Schnell* v. *City of Chicago,* 407 F. 2d 1084, 1086 (CA7 1969). See also *Inmates of Suffolk County Jail* v. *Eisenstadt,* 494 F. 2d 1196, 1199 (CA1), cert. denied, 419

In the instant case, the District Court found that although there was no departmental policy of racial discrimination, "such violations do occur, with such frequency that they cannot be dismissed as rare, isolated instances; and that little or nothing is done by the city authorities to punish such infractions, or to prevent their recurrence," 357 F. Supp., at 1319, and that it "is the policy of the department to discourage the filing of such complaints, to avoid or minimize the consequences of proven police misconduct, and to resist disclosure of the final disposition of such complaints." *Id.*, at 1318. Needless to say, petitioners were under a statutory duty to supervise their subordinates. See Philadelphia Home Rule Charter, c. 2, § 5–200. I agree with the District Court that its findings are sufficient to bring petitioners within the ambit of § 1983.

Further, the applicability of § 1983 to controlling officers allows the district courts to avoid the necessity of injunctions issued against individual officers and the consequent continuing supervision by the federal courts of the day-to-day activities of the men on the street. The District Court aptly stated:

> "Respect and admiration for the performance of the vast majority of police officers cannot justify refusal to confront the reality of the abuses which

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U. S. 977 (1974), and *Rozecki* v. *Gaughan*, 459 F. 2d 6, 8 (CA1 1972); *Wright* v. *McMann*, 460 F. 2d 126, 134–135 (CA2), cert. denied, 409 U. S. 885 (1972); *Lewis* v. *Kugler*, 446 F. 2d 1343, 1351 (CA3 1971); *Lankford* v. *Gelston*, 364 F. 2d 197 (CA4 1966); *Jennings* v. *Patterson*, 460 F. 2d 1021, 1022 (CA5 1972); *Smith* v. *Ross*, 482 F. 2d 33, 36 (CA6 1973); *Byrd* v. *Brishke*, 466 F. 2d 6, 10–11 (CA7 1972); *Jennings* v. *Davis*, 476 F. 2d 1271, 1275 (CA8 1973); *Dewell* v. *Lawson*, 489 F. 2d 877, 881 (CA10 1974); *Carter* v. *Carlson*, 144 U. S. App. D. C. 388, 395, 447 F. 2d 358, 365 (1971), rev'd on other grounds *sub nom. District of Columbia* v. *Carter*, 409 U. S. 418 (1973).

> do exist. But deference to the essential role of the police in our society does mandate that intrusion by the courts into this sensitive area should be limited, and should be directed toward insuring that the police themselves are encouraged to remedy the situation." 357 F. Supp., at 1320.

I would regard what was accomplished in this case as one of those rightly rare but nevertheless justified instances—just as *Allee* and *Hague*—of federal-court "intervention" in a state or municipal executive area. The facts, the deprival of constitutional rights, and the pattern are all proved in sufficient degree. And the remedy is carefully delineated, worked out within the administrative structure rather than superimposed by edict upon it, and essentially, and concededly, "livable." In the City of Brotherly Love—or in any other American city—no less should be expected. It is a matter of regret that the Court sees fit to nullify what so meticulously and thoughtfully has been evolved to satisfy an existing need relating to constitutional rights that we cherish and hold dear.

NATIONAL INDEPENDENT COAL OPERATORS' ASSOCIATION ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-2066. Argued October 6, 1975—Decided January 26, 1976

Section 109 (a) (1) of the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior to assess a civil monetary penalty against a coal mine operator for each violation of the mandatory health and safety standards prescribed by the Act and other provisions. But under § 109 (a) (3) a penalty may be assessed only after the operator "has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ." Implementing regulations provide that assessment officers assess a penalty based on a notice of violation issued by mine inspectors and a penalty schedule graduated according to the seriousness of the violation, and further provide that if the mine operator fails to make a timely protest against the proposed assessment and to request adjudication he is deemed to waive his right to protest, including his right to formal adjudication and opportunity for hearing, and the proposed assessment becomes the Secretary's "final assessment." An unpaid penalty is enforceable under the Act only by way of subsequent judicial hearing in a district court in which the operator is entitled to a trial *de novo* as to the amount of the penalty. Petitioners sought injunctive and declaratory relief on the ground that the summary civil penalty assessment procedures permitted by the regulations violated the Act's procedural requirements. The District Court upheld this contention, ruling that the Secretary must make express findings of fact, whether or not the operator requests a hearing. The Court of Appeals reversed. *Held:* The language of § 109 (a) (3), especially when read in light of its legislative history, requires the Secretary to make formal findings of fact as a predicate for a penalty assessment order only when the mine operator exercises his

statutory right to request an administrative hearing on the factual issues relating to the penalty. Pp. 397–402.

(a) The word "opportunity" as used in § 109 (a)(3) would be meaningless if the statute contemplated formal adjudicated findings whether or not a requested evidentiary hearing is held, and absent a request for a hearing, the Secretary has a sufficient factual predicate for a penalty assessment based on the reports of the qualified inspectors who find violations; when the assessment officers fix penalties, as the Secretary's "authorized representatives," the operator may still have the penalty reviewed in the district court. P. 398.

(b) The requirement for a formal hearing under § 109 (a)(3) is keyed to a request, and the requirement for formal findings is keyed to the same request. P. 398.

(c) Such a reading of the statute comports with the Act's purpose of imposing stricter coal mine regulation to prevent accidents and disasters; the deterrent provided by monetary sanctions is essential to that purpose, and effective enforcement of the Act would be weakened were the Secretary required to make findings of fact for every penalty assessment including those cases in which the mine operator did not request a hearing, thus indicating no disagreement with the Secretary's proposed determination. Pp. 398–399.

161 U. S. App. D. C. 68, 494 F. 2d 987, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

John L. Kilcullen argued the cause and filed a brief for petitioners.

Deputy Solicitor General Randolph argued the cause for respondents. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Leonard Schaitman,* and *Michael Kimmel.**

**Guy Farmer* and *William A. Gershuny* filed a brief for the Bituminous Coal Operators' Assn., Inc., as *amicus curiae* urging reversal.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case [1] presents the question whether the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, requires the Secretary of the Interior to prepare a decision with formal findings of fact before assessing a civil penalty against a mine operator absent a request by the mine operator for an administrative hearing, the penalty being enforceable only by way of a subsequent judicial proceeding in which the operator is entitled to a trial *de novo* as to the amount of the penalty.

The National Independent Coal Operators' Association sought declaratory and injunctive relief on the ground that certain civil penalty assessment regulations utilized by the Secretary violated the procedural requirements of the Act. The Court of Appeals for the District of Columbia Circuit held that the regulations did not violate the Act.[2] *National Independent Coal Operators' Assn.* v. *Morton*, 161 U. S. App. D. C. 68, 494 F. 2d 987 (1974).

We granted certiorari, 420 U. S. 906 (1975), to resolve the apparent conflict between the District of Columbia Circuit and the Third Circuit holding in *Morton* v. *Delta Mining, Inc.*, 495 F. 2d 38 (1974), reversed and remanded, *post*, p. 403.

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[1] Consolidated with No. 74-521, *Kleppe* v. *Delta Mining, Inc.*, *post*, p. 403.

[2] In the companion case, *supra*, three mine operators in a consolidated action raised the same challenge as a defense when the Secretary sought judicial enforcement of assessment orders in a suit, where, under the Act, the operators had a right to a trial *de novo* as to the amount of the penalties. The Court of Appeals for the Third Circuit noted the District of Columbia Circuit's holding but held that the regulations were invalid for failure to require findings of fact, rejecting the Secretary's contention that such findings are required only when an administrative hearing is requested by a mine operator.

(1)

The statutory provision in question, § 109 (a)(3), 30 U. S. C. § 819 (a)(3), is part of the enforcement scheme of the Federal Coal Mine Health and Safety Act of 1969. The Act prescribes health and safety standards for the protection of coal miners, Titles II and III, 30 U. S. C. § 841 *et seq.;* it requires coal mine operators and miners to comply with the standards. § 2 (g)(2), 30 U. S. C. § 801 (g)(2).

Section 103 of the Act, 30 U. S. C. § 813, requires the Secretary to conduct continuing surveillance of mines by inspectors. Among the purposes of the inspections are finding imminently dangerous conditions and violations of mandatory health or safety standards. Section 104, 30 U. S. C. § 814, provides procedures for abating the conditions found by the inspectors. If an imminent danger is found, the inspector is required to issue a withdrawal order compelling the mine operator to withdraw all persons from the danger area. If a violation of a mandatory standard is found that is not imminently dangerous, the inspector issues a notice to the operator fixing a reasonable time for its abatement. If the violation is not abated and the time for abatement is not extended, the inspector then issues a withdrawal order. Withdrawal orders are also issued for any "unwarrantable failure" of mine operators to comply with the standards. The notices and orders issued contain a detailed description of the dangerous conditions or violations and their locations. The notices must be in writing and given promptly to the mine operators.

Under § 105, 30 U. S. C. § 815, an operator may apply to the Secretary for review of the factual basis of any order or notice issued under § 104, or for review of the amount of time allowed for abatement of violations. Upon application from a mine operator the Secretary

makes whatever investigation he deems appropriate; an opportunity for a public hearing is provided. Hearings are subject to § 5 of the Administrative Procedure Act, 5 U. S. C. § 554, and following the hearing the Secretary must make findings of fact. Section 105 also requires that actions by the Secretary be taken promptly because of the urgent need for prompt decision. The orders issued by the Secretary under this section are subject to judicial review under § 106, 30 U. S. C. § 816, by a court of appeals.

As part of the enforcement scheme, the Act requires the Secretary to assess and collect civil penalties. Section 109 (a)(1), 30 U. S. C. § 819 (a)(1), subjects mine operators to civil penalties not exceeding $10,000 for each violation of a mandatory standard or other provision of the Act. In determining the amount of the penalty, § 109 (a)(1) requires the Secretary to consider

> "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation."

The provision in question, § 109 (a)(3), as noted above, authorizes the Secretary to assess a civil penalty only after the operator charged with a violation "has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ." Hearings under this section are to be consolidated with other proceedings when appropriate. They must be of record

and subject to provisions of the Administrative Procedure Act, 5 U. S. C. § 554.

If the operator does not pay the penalty assessed, the Secretary is required, pursuant to § 109 (a)(4), 30 U. S. C. § 819 (a)(4), to petition for judicial enforcement of the assessment in the district court for the district in which the mine is located. At that stage the court must resolve the issues relevant to the amount of the penalty in a *de novo* proceeding with a jury trial if requested. The trial *de novo* with a jury is not available for review of issues of fact which "were or could have been litigated" in the court of appeals under § 106.[3]

(2)

We are concerned in this case with the regulations the Secretary has adopted to govern only one part of this statutory scheme: the assessment of penalties under § 109 (a)(3). When the Secretary initially implemented the Act, he published regulations that provided for civil penalty assessments to be determined by a hearing examiner, with a right of appeal to a departmental appeals board. 30 CFR pt. 301 (1971), recodified, 43 CFR § 4.540 *et seq.* (1972). Nine months later, due to the large numbers of violations charged (approximately 80,000 or more per year), the Secretary adopted the regulations contested here. 30 CFR pt. 100 (1972).[4] These regulations pro-

[3] Respondents have suggested that trial *de novo* is available on the factual basis of the violation as well as on the amount of the penalty. The statutory scheme is less than clear on this matter. Compare § 106 with § 109 (a). See *Eastern Associated Coal Corp.* v. *Interior Bd. of Mine Operations Appeals*, 491 F. 2d 277 (CA4 1974). We need not reach the issue to dispose of this case.

[4] Those regulations have been reissued, 39 Fed. Reg. 27558–27561 (1974), since these suits were initiated. The mine operators in the companion case, *Kleppe* v. *Delta Mining, Inc.*, *post*, p. 403, argue that this case is moot. The case is not moot because there are

vide that assessment officers assess a penalty based on a notice of violation issued by mine inspectors and a penalty schedule graduated according to the seriousness of the violation.[5] The pt. 100 procedures follow the mandate of § 109 (a)(1) as to the criteria to be applied in determining the amount of the proposed penalty for an operator. 30 CFR § 100.4 (c).[6]

The regulations also provide that the operators are to be advised when they receive original or reissued proposed orders that they have 15 working days from the receipt of the order to "protest the proposed assessment, either partly or in its entirety." If an operator fails to make a timely protest and request adjudication, he is "deemed to have waived his right of protest including his right of formal adjudication and opportunity for hearing . . . ." The proposed assessment order then

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assessments under the contested regulations awaiting enforcement and because the new regulations also do not provide a hearing unless one is requested.

Unless otherwise indicated, all citations to the Code of Federal Regulations throughout this opinion are to the regulations effective at the time this suit was initiated (Jan. 1, 1972, for 30 CFR, and Oct. 1, 1972, for 43 CFR).

[5] Section 100.2 (b) of the regulations states that the amount of proposed civil penalty "shall be within guidelines established by the Secretary (see Appendix A to this part) and revised periodically in the light of experience gained under the Act . . . ." 30 CFR § 100.2 (b). Appendix A in effect at the time of this suit provided a range between $5,000 and $10,000 for violations resulting in the issuance of imminent-danger withdrawal orders (under § 104 (a) of the Act); a range between $1,000 and $5,000 for violations resulting in the issuance of other withdrawal orders (under §§ 104 (b), (c), (h), and (i) of the Act); a range between $100 and $1,000 for "serious violations"; and a range between $25 and $500 for other violations.

[6] A penalty schedule with formulas for considering the six criteria was promulgated after these suits were filed. 30 CFR § 100.3 (1975).

becomes the "final assessment order of the Secretary." 30 CFR § 100.4 (d–h).[7]

In any case in which an operator makes a timely request for a formal hearing, by so indicating in his protest, or in response to a reissued or amended proposed assessment order, the assessment officer is required to forward the matter to the Office of the Solicitor, Department of the Interior; a petition to assess a penalty can then be filed by the Solicitor with the Department's Office of Hearings and Appeals. 30 CFR § 100.4 (i)(1); 43 CFR § 4.540 (a). The petition is served on the operator who then has an opportunity to answer and secure a public hearing. 30 CFR § 100.4 (i)(2). A hearing *de novo* is conducted and the examiner is free to assess a different penalty.[8] 30 CFR § 100.4 (i)(4). The Bureau of Mines, represented by the Office of the Solicitor, has the burden of proving the penalty by a preponderance of the evidence. 43 CFR § 4.587. The regulations provide that the hearing examiner consider the statutory criteria. 43 CFR § 4.546.

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[7] The mine operators in the companion case contend that these orders are not final since the regulations provide only that the orders become final if accepted. 30 CFR § 100.4 (h). The regulations provide that a hearing can be requested but do not specify what happens if neither the orders are accepted nor a hearing is requested. This contention is without merit. The order is final. See 30 CFR § 100.4 (e). The regulation is not misleading.

[8] These uncontested regulations provide that if an operator fails to file a preliminary statement or response to a prehearing order, the hearing examiner can issue an order to show cause why the proceedings should not be summarily dismissed. 43 CFR § 4.545 (a). If the operator fails to respond to such an order, the proceedings are summarily dismissed and remanded to the assessment officer for entry of the last proposed order of assessment (issued under 30 CFR pt. 100) as the final assessment order of the Secretary. 43 CFR § 4.545 (b).

The decision is subject to review by the Secretary's delegate, the Board of Mine Operations Appeals. 43 CFR §§ 4.1 (b)(4), 4.500 (a)(2), 4.600.

Whether or not the operator requests formal adjudication, he may obtain *de novo* judicial review of the amount of the penalty by refusing to pay it and awaiting the Secretary's enforcement action in the district court. § 109 (a)(4), 30 U. S. C. § 819 (a)(4).

(3)

The National Independent Coal Operators' Association and various operators brought suit against the Secretary in the United States District Court for the District of Columbia to enjoin the use of the pt. 100 regulations. The court granted the Association's motion for summary judgment, holding that the summary procedures were not authorized by § 109 (a) of the Act. 357 F. Supp. 509 (1973). The court noted that there were no written guidelines within the assessment office to guide the assessment officers in evaluating or applying the statutory criteria for penalty assessment. The court held that the Secretary must make express findings of fact whether or not a hearing is requested. The court believed that requiring a mine operator to request a hearing "would shift the initial burden to the mine operator." *Id.*, at 512.

The Court of Appeals for the District of Columbia Circuit reversed, holding that the Secretary need not render a formal decision incorporating findings of fact; it held that, absent a request for a hearing, the Secretary is entitled to conclude that the operator does not dispute the proposed order, including the factual basis of the violation. In the view of that court, a "decision incorporating his findings of fact" with findings and conclusions is required only if a hearing is requested and takes place; otherwise, any findings of fact would consist of essen-

tially the same information already recited in the proposed assessment order and would be a meaningless duplication. The court also noted that the legislative history of the Act supports an interpretation that the Secretary's findings are not required unless the operator requests a hearing; however, when a hearing is requested, the burden of proof remains with the Secretary. 161 U. S. App. D. C. 68, 494 F. 2d 987 (1974).

(4)

Under the Act, a mine operator plainly has a right to notice of violations and proposed penalties; it is equally clear that an operator has a right to be heard, if a hearing is requested. In this Court the mine operators continue to urge that the Secretary may not assess a civil penalty without making formal "findings of fact" even though no hearing was requested as to the violation charged and the proposed order.

Section 109 (a)(3), as previously noted, provides:

> "A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this Act has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted . . . ."

The operators argue that a penalty assessment itself is an adjudicatory function and hence the Secretary must make a formal "decision incorporating his findings of fact" even when an operator has not requested a hearing on the violation issue. In short, what they argue for is the same type of formal findings of fact that are the usual product of the adversary hearing to which they have an absolute right, but which was waived by failure to make a request.

Section 109 (a)(3) provides the mine operators with no more than "an opportunity" for a hearing. The word "opportunity" would be meaningless if the statute contemplated formal adjudicated findings whether or not a requested evidentiary hearing is held. Absent a request, the Secretary has a sufficient factual predicate for the assessment of a penalty based on the reports of the trained and experienced inspectors who find violations; when the assessment officers fix penalties as the Secretary's "authorized representatives," the operators may still have review of the penalty in the district court.[9] See *Morton* v. *Whitaker*, Civ. No. 74.96 (ED Ky., Jan. 14, 1975) (appeal pending in CA6).

We therefore agree with the Court of Appeals that the language of the statute, especially when read in light of its legislative history, requires the Secretary to make formal findings of fact specified in § 109 (a)(3) only when the mine operator requests a hearing. The requirement for a formal hearing under § 109 (a)(3) is keyed to a request, and the requirement for formal findings is keyed to the same request.

This reading of the statute plainly comports with the purpose of the Act. Congressional attention was focused on the need for stricter coal mine regulations by a 1968 explosion in a Farmington, W. Va., mine which killed 78 miners, but Congress also recognized that an inordinate number of miners lose their lives in day-to-day accidents other than multidisaster situations. The Act was seen as a major step in preventing death and

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[9] At the time of the events giving rise to these actions, the Act was enforced by the Secretary's delegate, the Bureau of Mines. The Bureau's safety and enforcement functions have since been transferred to a newly created Mining Enforcement and Safety Administration, Department of the Interior. 38 Fed. Reg. 18665–18668, 18695–18696 (1973).

injury in mines. H. R. Rep. No. 91–563, pp. 1–3 (1969). The need for stricter regulation of coal mines was commented on by President Truman when he signed the 1952 amendment to the Federal Coal Mine Safety Act, 66 Stat. 692. In approving that measure into law he called the attention of Congress to its flaws:

> "The measure contains complex procedural provisions relating to inspections, appeals, and the postponing of orders which I believe will make it exceedingly difficult, if not impossible, for those charged with the administration of the act to carry out an effective enforcement program."

Congress noted President Truman's comments when it reported the 1969 Act. S. Rep. No. 91–411, p. 5 (1969). Effective enforcement of the Act would be weakened if the Secretary were required to make findings of fact for every penalty assessment including those cases in which the mine operator did not request a hearing and thereby indicated no disagreement with the Secretary's proposed determination. While a protest by a mine operator may trigger an administrative re-examination, the protest is not the equivalent of a request for a hearing. When no request for a hearing is made, the operator has in effect voluntarily defaulted and abandoned the right to a hearing and findings of fact on the factual basis of the violation and the penalty.

The Court of Appeals for the District of Columbia Circuit regarded § 109 as possibly ambiguous and turned to the legislative history. Assuming, *arguendo*, that the statute is ambiguous, we read that history as supporting the result reached by the Court of Appeals. The bills passed by the Senate and House each called for hearings only if requested. The House bill provided:

> "Upon written request made by an operator within thirty days after receipt of an order assessing a

penalty under this section, the Secretary *shall afford such operator an opportunity* for a hearing and, *in accordance with the request*, determine by decision whether or not a violation did occur or whether the amount of the penalty is warranted or should be compromised." H. R. 13950, 91st Cong., 1st Sess., § 109 (b) (1969). (Emphasis added.)

The Senate bill read:

"An order assessing a civil penalty under this subsection shall be issued by the Secretary only after the person against whom the order is issued has been *given an opportunity* for a hearing and the Secretary has determined by decision incorporating findings of fact *based on the record of such hearing* whether or not a violation did occur and the amount of the penalty, if any, which is warranted. Section 554 of title 5 of the United States Code shall apply to any such hearing and decision." S. 2917, 91st Cong., 1st Sess., § 308 (a)(3) (1969). (Emphasis added.)

Thus it is clear that under both bills the requirement for a formal decision with findings was contingent on the operator's request for a hearing.

Both bills were referred to a Conference Committee to resolve differences. The Conference Committee adopted the Senate version but deleted the second italicized phrase. That change did not alter the requirement that if findings of fact are desired, a hearing must be requested. The Conference Committee explained § 109 as follows:

"*Both the Senate bill and the House amendment provided an opportunity for a hearing* in assessing such penalties, but the Senate bill required a record hearing under 5 U. S. C. [§] 554. The conference substitute adopts the Senate provision with the

> added provision that, where appropriate, such as in the case of an appeal from a withdrawal order, an effort should be made to consolidate the hearings. The commencement of such proceedings, however, shall not stay any notice or order involving a violation of a standard." H. R. Conf. Rep. No. 91–761, p. 71 (1969). (Emphasis added.)

No mention was made of the language deleted from the Senate bill or the similar language contained in the House bill. A change to require findings of fact without a request for a hearing would be a significant matter that would not likely have escaped attention; such a change would have called for explanation.[10]

The importance of § 109 in the enforcement of the Act cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. The inspections may be as infrequent as four a year. A major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.

We conclude, as did the Court of Appeals, that the Federal Coal Mine Health and Safety Act of 1969 does not mandate a formal decision with findings as a predicate for a penalty assessment order unless the mine

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[10] A Conference Committee does not have authority to make changes on matters as to which both bills agree. 2 U. S. C. § 190c (a) (Sen. Conf. Reps.); Rule XXVIII (3), Rules of the House of Representatives; and § 546, Jefferson's Manual, H. R. Doc. No. 384, 92d Cong., 2d Sess., 526, 270–271 (1973).

operator exercises his statutory right to request a hearing on the factual issues relating to the penalty, and the judgment of the Court of Appeals is therefore

Affirmed.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Syllabus

KLEPPE, SECRETARY OF THE INTERIOR *v.* DELTA MINING, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 74–521. Argued October 6, 1975—Decided January 26, 1976

Section 109 (a)(1) of the Federal Coal Mine Health and Safety Act of 1969 requires the Secretary of the Interior, in determining the amount of the civil penalty against a coal mine operator for violations of the Act, to consider the history of previous violations, the appropriateness of the penalty to the size of the business, whether the operator was negligent, the effect on his ability to continue in business, the gravity of the violation, and the operator's good faith in attempting to comply after notification of a violation. Section 109 (a)(3) requires that the penalty be assessed only after the operator "has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted." Respondent mine operators protested assessed penalties but did not request formal adjudication, and after they refused to pay the assessments, the Secretary brought suits against them in the District Court seeking enforcement of the assessments. The District Court entered judgments in favor of respondents on the ground that the assessments were not supported by adequate findings of fact, and was upheld by the Court of Appeals. *Held:* Section 109 (a)(3) does not compel the Secretary to support each penalty assessment order with express findings of fact concerning the violation and the amount of the penalty, absent a request by the mine operator for an administrative hearing. *National Independent Coal Operators' Assn.* v. *Kleppe, ante,* p. 388. Pp. 407–411.

(a) A protest against a penalty assessment, as opposed to a request for a hearing, does not necessarily trigger an administrative review, but the amount of the penalty is subject to *de novo* review in the district court whether or not a hearing was held. Pp. 407–408.

(b) It is not significant that the proposed assessment orders contained merely *pro forma* recitations that the six factors speci-

fied in § 109 (a) (1) had been considered, or that the Secretary's final orders did not mention such factors but merely set forth his finding that a violation did in fact occur. Although express findings are generally required for judicial review of an administrative determination based on a substantial-evidence test, here the operators can contest the amount of the penalty without a hearing by refusing to pay it, thus invoking the right to a *de novo* trial in the district court; moreover, when an operator is informed as to the details of a violation, § 105's administrative procedures come into play and appellate review is available. Pp. 408–409.

495 F. 2d 38, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all Members joined except STEVENS, J., who took no part in the consideration or decision of the case.

Deputy Solicitor General Randolph argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Leonard Schaitman,* and *Michael Kimmel.*

Fred Blackwell argued the cause and filed a brief for respondents. *John L. Kilcullen* filed a reply brief for respondent Mears et al.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case and consolidated it for argument with No. 73–2066, *National Independent Coal Operators' Assn.* v. *Kleppe, ante,* p. 388, decided today, to resolve an apparent conflict between the two Circuits.

**Joseph A. Yablonski, Daniel B. Edelman,* and *Paul R. Hoeber* filed a brief for the United Mine Workers of America as *amicus curiae* urging reversal.

Guy Farmer and *William A. Gershuny* filed a brief for the Bituminous Coal Operators' Assn., Inc., as *amicus curiae* urging affirmance.

In 1971 and January 1972 inspectors from the Bureau of Mines entered and inspected the coal mines owned respectively by Delta Mining, Inc., G. M. W. Coal Co., Inc., and a partnership of Edward Mears and others known as the M. Y. Coal Co. The inspectors detected a number of violations of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U. S. C. § 801 *et seq.*, or regulations and served each mine operator with notices of the infractions.[1] Each notice stated that the violations were to be abated by a specified date. The inspectors returned on that date and furnished the mine operators with a notice that the violations had been abated. The local office of the Bureau of Mines sent copies of the notice of violation and abatement to the Bureau's central office. There an assessment officer reviewed the notices and sent proposed penalty assessment orders to the mine operators. The orders contained a list of the violations, the dates of their occurrence, the regulations violated, and the amounts of the proposed penalties.

The proposed order of assessment to Delta was issued on April 11, 1972. It referred to six violations with civil penalties for each ranging from $30 to $90 for a total of $375. In December 1971, and January and May 1972, G. M. W. was issued proposed assessment orders for violations occurring from May to December 1971. Ten of the violations were assessed civil penalties from $25 to $100, totaling $525. G. M. W. also received an imminent-danger withdrawal order on November 24, 1971,

[1] The operators protest that these notices are not part of the record below. Since the issue before this Court is the validity of the regulations, not whether the regulations were properly complied with, for purposes of this case we will assume the notices were properly served. We note, however, that the mine operators do not contend that they were not given ample notice of the violations charged by the mine inspectors.

identified as a fire hazard from loose coal in excess of three feet deep and was assessed a fine of $5,000. For violations occurring in 1971 and 1972 Mears received assessments with fines for 16 violations ranging from $25 to $100 and a 17th at $200 for a total of $1,000. It also received a withdrawal order for failure to abate a violation of the respirable-dust-concentration standard with a fine of $1,000.

Each of the operators protested the proposed assessments. Delta argued, among other things, that it was a newly opened, small mine and the fines would affect its ability to stay in business. G. M. W. protested that the loose coal was wet and therefore not a fire hazard. Without explanation as to how, if at all, the information in the protest letters was considered, the assessment officer reissued the proposed orders. One of G. M. W.'s penalties was reduced from $100 to $50. The operators were again informed that they had 15 working days from the receipt of the reissued proposed order "to accept the amended or reissued order, whereupon it shall become the final assessment order of the Secretary, or to request formal adjudication with opportunity for hearing." None of the operators requested formal adjudication.

The mine operators did not pay the assessments. The Secretary filed complaints against each of them in October and November 1972, seeking enforcement of the assessments. Attached to the complaints were the proposed orders of assessment and preprinted forms reciting that the assessment officer found in fact that the violations had occurred. These forms were dated several months after the proposed assessment orders. The mine operators each answered, denying liability.

While the cases were awaiting trial, the United States District Court for the District of Columbia enjoined the Secretary from utilizing or enforcing the assessment pro-

cedures of 30 CFR pt. 100 (1972), concluding that § 109 (a)(3) of the Federal Coal Mine Health and Safety Act, 30 U. S. C. § 819 (a)(3), requires the Secretary to prepare a decision incorporating findings of fact in all penalty assessment determinations, whether or not a hearing is requested. *National Independent Coal Operators' Assn.* v. *Morton,* 357 F. Supp. 509 (1973).

On the basis of that decision G. M. W. moved for summary judgment, contending that the Secretary's assessment orders were unenforceable since there had been no "decision incorporating . . . findings of fact." The District Court for the Western District of Pennsylvania, relying on the *National Independent* decision, decided that the penalty assessments sought to be enforced by the Secretary did not meet the requirements of § 109 (a)(3) of the Act because they were not supported by adequate findings of fact. The court entered judgment in favor of the respondent mine operators in all three cases.

While the cases were pending on appeal, the Court of Appeals for the District of Columbia Circuit reversed the decisions on which the trial court here relied. *National Independent Coal Operators' Assn.* v. *Morton,* 161 U. S. App. D. C. 68, 494 F. 2d 987 (1974). The Court of Appeals for the Third Circuit, however, declined to follow the District of Columbia Circuit decision, and held that § 109 (a)(3) compels the Secretary to support each assessment order with express findings of fact concerning the violation and the amount of the penalty, without regard to whether or not the operator requests a hearing. 495 F. 2d 38 (1974). We have today affirmed *National Independent,* which holding governs this case. Two remaining issues raised by the Third Circuit holding require discussion.

The Court of Appeals first distinguished the District of Columbia Circuit holding on the ground that the "opera-

tors' failure to request a hearing in no way suggests that the appropriateness of the penalty amount went undisputed. In each instance, the operators lodged protests. . . ." 495 F. 2d, at 44. This overlooks the fact that while a protest does not necessarily trigger administrative review, a request for a hearing does. Here the party against whom a penalty is assessed has deliberately forgone the opportunity for a full, public, administrative hearing from which findings of fact can be made. Here, too, the amount of the penalty is subject to *de novo* review in the district court whether or not a hearing was held.

The Court of Appeals next distinguished the holding of the District of Columbia Circuit on the ground that the proposed assessment orders at issue "contained *no* 'information' other than *pro forma* recitations that the six criteria [of § 109 (a)(1) of the Act] had been considered." (Emphasis in original.) *Ibid.* The court was concerned that the proposed assessment orders were on "preprinted forms which recited, in some instances, that the six factors set out in the statute had been considered" and that the final orders of the Secretary did not mention the six criteria but "merely set forth the Secretary's finding that a violation 'did, in fact, occur.'" *Id.*, at 40.[2] The court then held that "each final decision of

[2] The Third Circuit found support for its concern in a Comptroller General's report which stated that the Comptroller was " 'unable to determine the adequacy of the consideration given to the six factors [of § 109 (a)(1)] and the basis for the penalties assessed in [400] sample cases.' " 495 F. 2d, at 43. However, the Secretary's method of assessing penalties has been changed in a way that largely meets this objection. The regulations now in force contain formulas to be used by the assessment officers in considering the six § 109 (a)(1) criteria. 30 CFR § 100.3 (1975). The Secretary represented to the Court of Appeals for the District of Columbia Circuit that the assessment formula is to be retained. *National Coal Operators' Assn.* v. *Morton*, 161 U. S. App. D. C. 68, 70 n. 12, 494 F. 2d 987, 989

the Secretary must be accompanied by findings of fact, concerning both the fact of violation and the magnitude of the penalty." *Id.*, at 44.

The court noted the general proposition that judicial "review of a final administrative determination . . . is rendered practically impossible, or at least vastly more difficult, where the agency's decision is not accompanied by express findings." *Id.*, at 42. We agree with the general proposition when judicial review is based on a substantial-evidence test. Here, however, if an operator wishes to contest the amount of the penalty without a hearing, that can be done by refusing to pay the penalty, thus invoking the right to a *de novo* trial in the district court, with a jury if desired. When a violation is noticed the operator is informed as to the details of the nature and location of that violation; the administrative procedures of § 105 of the Act, 30 U. S. C. § 815, with provision for a public hearing on request, come into play and appellate review is available.

In light of our holding in *National Independent Coal Operators' Assn.* v. *Kleppe, ante,* p. 388, the judgment of

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n. 12 (1974). These regulations were not in effect when the penalties at issue here were levied. Use of the current regulations is preferable to the apparent *ad hoc* consideration given the criteria in this case. But a trial *de novo* is available to the mine operators on the amount of the penalty, so the Secretary's failure to promulgate the best regulations in the first instance does not render all penalties assessed under the prior regulations unenforceable. Although explication by the assessment officer and an examiner might be of some aid to the district judge who is called upon to consider the penalty, the provision for a *de novo* trial on the amount of the penalty places squarely on the court the task of evaluating the penalty. The six criteria of § 109 (a)(1) can be argued to the district court. The Third Circuit is undoubtedly correct that the more information a mine operator has, the better the operator will be able to determine whether to challenge the penalty. The issue, however, was whether the new procedures were mandated by the statute.

the Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent herewith.

Reversed and remanded.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

Syllabus

UNITED STATES *v.* WATSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74–538. Argued October 8, 1975—Decided January 26, 1976

A postal inspector received from an informant of known reliability a stolen credit card that respondent had given the informant to be used for their mutual advantage, and the inspector was told by the informant that respondent had agreed to furnish additional cards. At the inspector's suggestion, a meeting was arranged between the informant and respondent for a few days later, which took place at a restaurant. Upon a prearranged signal from the informant that respondent had the additional cards, postal officers made a warrantless arrest of respondent, removed him from the restaurant, and gave him *Miranda* warnings. When a search of respondent's person revealed no cards, a consented search of his nearby car (after respondent had been cautioned that the results could be used against him) revealed two additional cards in the names of other persons. Following an unsuccessful motion to suppress, these cards were used as evidence in respondent's trial, which resulted in his conviction of possessing stolen mail. The Court of Appeals reversed, ruling that the Fourth Amendment prohibited use of that evidence because (1) notwithstanding probable cause for respondent's arrest, the arrest was unconstitutional because the postal inspector had failed to secure an arrest warrant though he had time to do so, and (2) based on the totality of the circumstances (including the illegality of the arrest) respondent's consent to the car search was coerced and thus invalid. *Held:*

1. The arrest of respondent, having been based on probable cause and made by postal officers acting in strict compliance with the governing statute and regulations, did not violate the Fourth Amendment. Pp. 414–424.

2. Since the arrest comported with the Fourth Amendment, respondent's consent to the car search was not, contrary to the holding of the Court of Appeals, the product of an illegal arrest, nor were there any other circumstances indicating that respondent's consent was not his own "essentially free and unconstrained

choice" because his "will ha[d] been . . . overborne and his capacity for self-determination critically impaired," *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225. Pp. 424–425.

504 F. 2d 849, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 425. STEWART, J., filed an opinion concurring in the result, *post*, p. 433. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 433. STEVENS, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Frey argued the cause for the United States. With him on the briefs were *Solicitor General Bork, Acting Assistant Attorney General Keeney,* and *Peter M. Shannon, Jr.*

Michael D. Nasatir, by appointment of the Court, 421 U. S. 997, argued the cause for respondent. With him on the brief was *Donald M. Re.*

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents questions under the Fourth Amendment as to the legality of a warrantless arrest and of an ensuing search of the arrestee's automobile carried out with his purported consent.

I

The relevant events began on August 17, 1972, when an informant, one Khoury, telephoned a postal inspector informing him that respondent Watson was in possession of a stolen credit card and had asked Khoury to cooperate in using the card to their mutual advantage. On five to 10 previous occasions Khoury had provided the inspector with reliable information on postal inspection matters, some involving Watson. Later that day

Khoury delivered the card to the inspector. On learning that Watson had agreed to furnish additional cards, the inspector asked Khoury to arrange to meet with Watson. Khoury did so, a meeting being scheduled for August 22.[1] Watson canceled that engagement, but at noon on August 23, Khoury met with Watson at a restaurant designated by the latter. Khoury had been instructed that if Watson had additional stolen credit cards, Khoury was to give a designated signal. The signal was given, the officers closed in, and Watson was forthwith arrested. He was removed from the restaurant to the street where he was given the warnings required by *Miranda* v. *Arizona,* 384 U. S. 436 (1966). A search having revealed that Watson had no credit cards on his person, the inspector asked if he could look inside Watson's car, which was standing within view. Watson said, "Go ahead," and repeated these words when the inspector cautioned that "[i]f I find anything, it is going to go against you." Using keys furnished by Watson, the inspector entered the car and found under the floor mat an envelope containing two credit cards in the names of other persons. These cards were the basis for two counts of a four-count indictment charging Watson with possessing stolen mail in violation of 18 U. S. C. § 1708.[2]

Prior to trial, Watson moved to suppress the cards, claiming that his arrest was illegal for want of probable cause and an arrest warrant and that his consent to search the car was involuntary and ineffective because he had not been told that he could withhold consent.

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[1] In the meantime the inspector had verified that the card was stolen.

[2] Title 18 U. S. C. § 1708 punishes the theft of mail as well as the possession of stolen mail. The punishment is a fine of not more than $2,000 or imprisonment for not more than five years, or both.

The motion was denied, and Watson was convicted of illegally possessing the two cards seized from his car.[3]

A divided panel of the Court of Appeals for the Ninth Circuit reversed, 504 F. 2d 849 (1974), ruling that the admission in evidence of the two credit cards found in the car was prohibited by the Fourth Amendment. In reaching this judgment, the court decided two issues in Watson's favor. First, notwithstanding its agreement with the District Court that Khoury was reliable and that there was probable cause for arresting Watson, the court held the arrest unconstitutional because the postal inspector had failed to secure an arrest warrant although he concededly had time to do so. Second, based on the totality of the circumstances, one of which was the illegality of the arrest, the court held Watson's consent to search had been coerced and hence was not a valid ground for the warrantless search of the automobile. We granted certiorari. 420 U. S. 924 (1975).

II

A major part of the Court of Appeals' opinion was its holding that Watson's warrantless arrest violated the Fourth Amendment. Although it did not expressly do so, it may have intended to overturn the conviction on the independent ground that the two credit cards were the inadmissible fruits of an unconstitutional arrest. Cf. *Brown* v. *Illinois*, 422 U. S. 590 (1975). However that may be, the Court of Appeals treated the illegality of Watson's arrest as an important factor in determining the voluntariness of his consent to search his car. We therefore deal first with the arrest issue.

Contrary to the Court of Appeals' view, Watson's arrest was not invalid because executed without a warrant.

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[3] Watson was acquitted on the second count. The fourth was dismissed prior to trial.

Title 18 U. S. C. § 3061 (a)(3) expressly empowers the Board of Governors of the Postal Service to authorize Postal Service officers and employees "performing duties related to the inspection of postal matters" to

> "make arrests without warrant for felonies cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony."

By regulation, 39 CFR § 232.5 (a)(3) (1975), and in identical language, the Board of Governors has exercised that power and authorized warrantless arrests. Because there was probable cause in this case to believe that Watson had violated § 1708, the inspector and his subordinates, in arresting Watson, were acting strictly in accordance with the governing statute and regulations. The effect of the judgment of the Court of Appeals was to invalidate the statute as applied in this case and as applied to all the situations where a court fails to find exigent circumstances justifying a warrantless arrest. We reverse that judgment.

Under the Fourth Amendment, the people are to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no Warrants shall issue, but upon probable cause . . . ." Section 3061 represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so.[4] This was not an

[4] At least since approval of the Act of June 10, 1955, c. 137, § 203, 69 Stat. 106, 39 U. S. C. § 3523 (a)(2)(K) (1964 ed.), postal inspectors' duties have been thought to permit arrest without a warrant upon probable cause. Compare *United States* v. *Helbock*, 76 F. Supp. 985 (Ore. 1948), with *United States* v. *Alexander*, 415 F. 2d 1352 (CA7 1969), cert. denied, 397 U. S. 1014 (1970); *Kelley* v. *Dunne*, 344 F. 2d 129 (CA1 1965); and *United*

isolated or quixotic judgment of the legislative branch. Other federal law enforcement officers have been expressly authorized by statute for many years to make felony arrests on probable cause but without a warrant. This is true of United States marshals, 18 U. S. C. § 3053, and of agents of the Federal Bureau of Investigation, 18 U. S. C. § 3052; the Drug Enforcement Administration, 84 Stat. 1273, 21 U. S. C. § 878; the Secret Service, 18 U. S. C. § 3056 (a); and the Customs Service, 26 U. S. C. § 7607.[5]

Because there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" "[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional." *United States* v. *Di Re*, 332 U. S. 581, 585 (1948). Moreover, there is nothing in the Court's prior cases indicating that under the

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States v. *Bell*, 294 F. Supp. 1314 (ND Ill. 1968). The Court of Appeals for the Ninth Circuit held, however, that § 3523 (a)(2)(K) did not give the necessary express power to arrest, but that a warrantless arrest by a postal inspector could be upheld by resort to a citizen's power to arrest. *United States* v. *DeCatur*, 430 F. 2d 365 (1970); *Neggo* v. *United States*, 390 F. 2d 609 (1968); *Ward* v. *United States*, 316 F. 2d 113, cert. denied, 375 U. S. 862 (1963).

In 1968 in the face of confusion generated by these decisions and two others striking down warrantless arrests by postal inspectors as not authorized by federal statute or by state law, *Alexander* v. *United States*, 390 F. 2d 101 (CA5 1968); *United States* v. *Moderacki*, 280 F. Supp. 633 (Del. 1968), the Congress enacted 18 U. S. C. § 3061 to make clear that postal inspectors are empowered to arrest without warrant upon probable cause. Pub. L. 90–560, § 5 (a), 82 Stat. 998; H. R. Conf. Rep. No. 1918, 90th Cong., 2d Sess., 6 (1968); H. R. Rep. No. 1725, 90th Cong., 2d Sess. (1968); 114 Cong. Rec. 20914–20915, 26928, 28864–28865 (1968).

[5] There are other federal officers subject to a more restrictive statutory standard. See, *e. g.*, 18 U. S. C. § 3050, with respect to employees of the Bureau of Prisons.

Fourth Amendment a warrant is required to make a valid arrest for a felony. Indeed, the relevant prior decisions are uniformly to the contrary.

"The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . . ." *Carroll* v. *United States,* 267 U. S. 132, 156 (1925). In *Henry* v. *United States,* 361 U. S. 98 (1959), the Court dealt with an FBI agent's warrantless arrest under 18 U. S. C. § 3052, which authorizes a warrantless arrest where there are reasonable grounds to believe that the person to be arrested has committed a felony. The Court declared that "[t]he statute states the constitutional standard . . . ." 361 U. S., at 100. The necessary inquiry, therefore, was not whether there was a warrant or whether there was time to get one, but whether there was probable cause for the arrest. In *Abel* v. *United States,* 362 U. S. 217, 232 (1960), the Court sustained an administrative arrest made without "a judicial warrant within the scope of the Fourth Amendment." The crucial question in *Draper* v. *United States,* 358 U. S. 307 (1959), was whether there was probable cause for the warrantless arrest. If there was, the Court said, "the arrest, though without a warrant, was lawful . . . ." *Id.,* at 310. *Ker* v. *California,* 374 U. S. 23, 34–35 (1963) (opinion of Clark, J.), reiterated the rule that "[t]he lawfulness of the arrest without warrant, in turn, must be based upon probable cause . . ." and went on to sustain the warrantless arrest over other claims going to the mode of entry. Just last Term, while recognizing that maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, we stated that "such a requirement would constitute an intolerable handicap for legitimate law enforcement" and noted that the Court "has never invalidated an arrest supported by probable cause solely

because the officers failed to secure a warrant." *Gerstein* v. *Pugh*, 420 U. S. 103, 113 (1975).[6]

The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest. 10 Halsbury's Laws of England 344–345 (3d ed. 1955); 4 W. Blackstone, Commentaries *292; 1 J. Stephen, A History of the Criminal Law of England 193 (1883); 2 M. Hale, Pleas of the Crown *72–74; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 547–550, 686–688 (1924);

[6] In the case before us the Court of Appeals relied heavily, but mistakenly, on *Coolidge* v. *New Hampshire*, 403 U. S. 443, 480–481 (1971), for as we noted in *Gerstein* v. *Pugh*, 420 U. S., at 113 n. 13, the still unsettled question posed in that part of the *Coolidge* opinion was "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." Watson's midday public arrest does not present that question.

In its proposed Model Code of Pre-arraignment Procedure, the American Law Institute has addressed the question and recommends that an officer who is empowered to make an arrest and has probable cause to believe the person to be arrested is on private premises be authorized to demand entry to such premises and thereupon to enter to make an arrest. ALI, Model Code of Pre-arraignment Procedure § 120.6 (1) (1975). In certain cases of necessity, however, notification and demand are not required. § 120.6 (2). Authority to make nighttime arrests on private premises is restricted to arrests with warrants authorizing nighttime execution and to certain cases of necessity. § 120.6 (3). The commentary states that 24 States (and the District of Columbia) authorize forcible entry whenever there is authority to arrest, six whenever the arrest is under a warrant or for a felony, six whenever the arrest is under a warrant, and two whenever the arrest is for a felony. *Id.*, at 310, 696–697. Of these jurisdictions all but three have prior-notice requirements for entries to make an arrest similar to those 18 U. S. C. § 3109 imposes on entries to execute a search warrant. ALI Model Code, *supra*, at 310–313.

Samuel v. *Payne*, 1 Doug. 359, 99 Eng. Rep. 230 (K. B. 1780); *Beckwith* v. *Philby*, 6 Barn. & Cress. 635, 108 Eng. Rep. 585 (K. B. 1827). This has also been the prevailing rule under state constitutions and statutes. "The rule of the common law, that a peace officer or a private citizen may arrest a felon without a warrant, has been generally held by the courts of the several States to be in force in cases of felony punishable by the civil tribunals." *Kurtz* v. *Moffitt*, 115 U. S. 487, 504 (1885).

In *Rohan* v. *Sawin*, 59 Mass. 281 (1850), a false-arrest case, the Supreme Judicial Court of Massachusetts held that the common-law rule obtained in that State. Given probable cause to arrest, "[t]he authority of a constable, to arrest without warrant, in cases of felony, is most fully established by the elementary books, and adjudicated cases." *Id.*, at 284. In reaching this judgment the court observed:

> "It has been sometimes contended, that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our national and state constitutions, forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon a complaint made under oath. They do not conflict with the authority of constables or other peace-officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety, and the due apprehension of criminals, charged with heinous offences, imperiously require that such arrests should be made without warrant by officers of the law." *Id.*, at 284–285.

Also rejected, *id.*, at 285–286, was the trial court's view that to justify a warrantless arrest, the State must show "an immediate necessity therefor, arising from the danger, that the plaintiff would otherwise escape, or secrete the stolen property, before a warrant could be procured against him." The Supreme Judicial Court ruled that there was no "authority for thus restricting a constable in the exercise of his authority to arrest for a felony without a warrant." *Id.*, at 286. Other early cases to similar effect were *Wakely* v. *Hart*, 6 Binn. 316 (Pa. 1814); *Tolley* v. *Mix*, 3 Wend. 350 (N. Y. Sup. Ct. 1829); *State* v. *Brown*, 5 Del. 505 (Ct. Gen. Sess. 1853); *Johnson* v. *State*, 30 Ga. 426 (1860); *Wade* v. *Chaffee*, 8 R. I. 224 (1865). See *Reuck* v. *McGregor*, 32 N. J. L. 70, 74 (Sup. Ct. 1866); *Baltimore & O. R. Co.* v. *Cain*, 81 Md. 87, 100, 102, 31 A. 801, 803, 804 (1895).[7]

Because the common-law rule authorizing arrests without a warrant generally prevailed in the States, it is important for present purposes to note that in 1792 Congress invested United States marshals and their deputies with "the same powers in executing the laws of the United States, as sheriffs and their deputies in the several states have by law, in executing the laws of their respective states." Act of May 2, 1792, c. 28, § 9, 1 Stat. 265. The Second Congress thus saw no inconsistency between the Fourth Amendment and legislation giving United States marshals the same power as local peace officers to arrest for a felony without a warrant.[8] This provision equating the power of federal mar-

[7] As Professor Wilgus observed in his article Arrest Without A Warrant, 22 Mich. L. Rev. 541, 549–550 (1924) (footnote omitted), "[i]t was early argued that similar provisions [to the Fourth Amendment of the Constitution] in state constitutions forbade arrests without a warrant; it was ruled otherwise as to arrests by officers and private persons according to the common law."

[8] Of equal import is the rule recognized by this Court that even

shals with those of local sheriffs was several times reenacted [9] and is today § 570 of Title 28 of the United States Code. That provision, however, was supplemented in 1935 by § 504a of the Judicial Code,[10] which in its essential elements is now 18 U. S. C. § 3053 and which expressly empowered marshals to make felony arrests without warrant and on probable cause. It was enacted to furnish a federal standard independent of the vagaries of state laws, the Committee Report remarking that under existing law a "marshal or deputy marshal may make an arrest without a warrant within his district in all cases where the sheriff might do so under the State statutes." H. R. Rep. No. 283, 74th Cong., 1st Sess., 1 (1935). See *United States* v. *Riggs*, 474 F. 2d 699, 702–703, n. 2 (CA2), cert. denied, 414 U. S. 820 (1973).

The balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact. It ap-

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in the absence of a federal statute granting or restricting the authority of federal law enforcement officers, "the law of the state where an arrest without warrant takes place determines its validity." *United States* v. *Di Re*, 332 U. S. 581, 589 (1948). Accord, *Miller* v. *United States*, 357 U. S. 301, 305 (1958); *Johnson* v. *United States*, 333 U. S. 10, 15 n. 5 (1948); *Bad Elk* v. *United States*, 177 U. S. 529, 535 (1900). This rule is consistent with the express statutory authority of United States marshals discussed in the text, as well as with the Act of Sept. 24, 1789, c. 20, § 33, 1 Stat. 91, providing that for any offense against the United States the offender may be arrested by any judge or justice of the United States "agreeably to the usual mode of process against offenders in such state" as he might be found. See *United States* v. *Di Re*, *supra*, at 589 n. 8.

[9] Act of Feb. 28, 1795, c. 36, § 9, 1 Stat. 425; Act of July 29, 1861, c. 25, § 7, 12 Stat. 282; Rev. Stat. § 788 (1874); Judicial Code of 1948, § 549, 62 Stat. 912.

[10] Act of June 15, 1935, c. 259, § 2, 49 Stat. 378.

pears in almost all of the States in the form of express statutory authorization. In 1963, the American Law Institute undertook the task of formulating a model statute governing police powers and practice in criminal law enforcement and related aspects of pretrial procedure. In 1975, after years of discussion, A Model Code of Pre-arraignment Procedure was proposed. Among its provisions was § 120.1 which authorizes an officer to take a person into custody if the officer has reasonable cause to believe that the person to be arrested has committed a felony, or has committed a misdemeanor or petty misdemeanor in his presence.[11] The commentary to this section said: "The Code thus adopts the traditional and almost universal standard for arrest without a warrant." [12]

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[11] Section 120.1 of the Model Code provides, in pertinent part:

"(1) *Authority to Arrest Without a Warrant.* A law enforcement officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed

"(a) a felony;

"(b) a misdemeanor, and the officer has reasonable cause to believe that such person

"(i) will not be apprehended unless immediately arrested; or

"(ii) may cause injury to himself or others or damage to property unless immediately arrested; or

"(c) a misdemeanor or petty misdemeanor in the officer's presence."

[12] *Id.*, at 289 (footnote omitted). The commentary goes on to say with respect to § 120.1:

"This Section does not require an officer to arrest under a warrant even if a reasonable opportunity to obtain a warrant exists. As to arrests on the street such a requirement would be entirely novel. Moreover the need for it is not urgent, and the subsequent inquiry such a requirement would authorize would be indeterminate and difficult." *Id.*, at 303 (footnotes omitted).

As the commentary notes, *id.*, at 289 n. 1, a statute in the State of Georgia is more restrictive of the arrest power than the general

This is the rule Congress has long directed its principal law enforcement officers to follow. Congress has plainly decided against conditioning warrantless arrest power on proof of exigent circumstances.[13] Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate. See *United States* v. *Ventresca*, 380 U. S. 102, 106 (1965); *Aguilar* v. *Texas*, 378 U. S. 108, 111 (1964); *Wong Sun* v. *United States*, 371 U. S. 471, 479–480 (1963). But we decline to transform this judicial preference into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable

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standard. Ga. Code Ann. § 27–207 (a) (Supp. 1975). See also Colo. Rev. Stat. Ann. § 16–3–102 (1973), which provides that an arrest warrant should be obtained "when practicable," and Mont. Rev. Codes Ann. § 95–608 (d) (1969) which authorizes a warrantless arrest if "existing circumstances require" it. A North Carolina statute, N. C. Gen. Stat. § 15–41 (1965), similar to the Georgia statute, was replaced in 1975 by a provision permitting warrantless felony arrests on probable cause. N. C. Gen. Stat. § 15A–401 (b)(2) (1975).

[13] Until 1951, 18 U. S. C. § 3052 conditioned the warrantless arrest powers of the agents of the Federal Bureau of Investigation on there being reasonable grounds to believe that the person would escape before a warrant could be obtained. The Act of Jan. 10, 1951, c. 1221, § 1, 64 Stat. 1239, eliminated this condition. The House Report explained the purpose of the amendment, H. R. Rep. No. 3228, 81st Cong., 2d Sess., 1–2 (1950), and the amendment was given effect by the courts in accordance with its terms. Compare *United States* v. *Coplon*, 185 F. 2d 629, 633–636 (CA2 1950), cert. denied, 342 U. S. 920 (1952), with *Coplon* v. *United States*, 89 U. S. App. D. C. 103, 108–109, 191 F. 2d 749, 753–754 (1951), cert. denied, 342 U. S. 926 (1952).

to get a warrant, whether the suspect was about to flee, and the like.

Watson's arrest did not violate the Fourth Amendment, and the Court of Appeals erred in holding to the contrary.

III

Because our judgment is that Watson's arrest comported with the Fourth Amendment, Watson's consent to the search of his car was not the product of an illegal arrest. To the extent that the issue of the voluntariness of Watson's consent was resolved on the premise that his arrest was illegal, the Court of Appeals was also in error.

We are satisfied in addition that the remaining factors relied upon by the Court of Appeals to invalidate Watson's consent are inadequate to demonstrate that, in the totality of the circumstances, Watson's consent was not his own "essentially free and unconstrained choice" because his "will ha[d] been overborne and his capacity for self-determination critically impaired." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 225 (1973). There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth*, the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance. There is no indication in this record that Watson was a newcomer

to the law,[14] mentally deficient, or unable in the face of a custodial arrest to exercise a free choice. He was given *Miranda* warnings and was further cautioned that the results of the search of his car could be used against him. He persisted in his consent.

In these circumstances, to hold that illegal coercion is made out from the fact of arrest and the failure to inform the arrestee that he could withhold consent would not be consistent with *Schneckloth* and would distort the voluntariness standard that we reaffirmed in that case.

In consequence, we reverse the judgment of the Court of Appeals.

So ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE POWELL, concurring.

Although I concur in the opinion of the Court, I write to express additional views. I note at the outset that the case could be disposed of on the ground that respondent's consent to the search was plainly voluntary. *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973). Indeed, the evidence that his consent was the product of free will is so overwhelming that I would have held the consent voluntary even on the assumption that the preceding warrantless arrest was unconstitutional, and that the doctrine of *Wong Sun* v. *United States*, 371 U. S. 471 (1963), therefore was applicable. See *Brown* v. *Illinois*, 422 U. S. 590 (1975). The Court's different route to

[14] On the contrary, the inspector making the arrest in this case had arrested Watson in 1971 for mail theft. Those charges were dropped when Watson cooperated with the prosecution. During the ensuing two years he also furnished information to the authorities.

the same result requires, however, an inquiry into the validity of the arrest itself.

I

Respondent was arrested without a warrant in a public restaurant six days after postal inspectors learned from a reliable source that he possessed stolen credit cards in violation of 18 U. S. C. § 1708. The Government made no effort to show that circumstances precluded the obtaining of a warrant, relying instead for the validity of the arrest solely upon the showing of probable cause to believe that respondent had committed a felony. Respondent contends, and the Court of Appeals held, that the absence of any exigency justifying the failure to procure a warrant renders this arrest violative of the Fourth Amendment.

In reversing the Court of Appeals, the Court concludes that nothing in our previous cases involving warrantless arrests supports the position of respondent and the Court of Appeals. See, *e. g., Gerstein* v. *Pugh*, 420 U. S. 103, 113 (1975). But it is fair to say, I think, that the prior decisions of the Court have assumed the validity of such arrests without addressing in a reasoned way the analysis advanced by respondent.[1] Today's decision is

[1] None of the decisions cited by the Court today squarely faced the issue. In *Henry* v. *United States*, 361 U. S. 98 (1959), for example, the Court declared that 18 U. S. C. § 3052, which authorizes an FBI agent to make a warrantless arrest when he has reasonable grounds to believe that a person has committed a felony, "states the constitutional standard." 361 U. S., at 100. But that declaration was made without discussion, and the issue actually presented to and addressed by the Court was whether there was in fact probable cause for the arrest in that case. Similarly, *Draper* v. *United States*, 358 U. S. 307 (1959), stands only for the validity of a warrantless arrest made with probable cause to believe that the arrestee had committed an offense in the arresting officer's presence. See *id.*, at 313. As this Court had noted in an earlier case,

the first square holding that the Fourth Amendment permits a duly authorized law enforcement officer to make a warrantless arrest in a public place even though he had adequate opportunity to procure a warrant after developing probable cause for arrest.

On its face, our decision today creates a certain anomaly. There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few "jealously and carefully drawn" exceptional circumstances. *Jones* v. *United States*, 357 U. S. 493, 499 (1958); see *Almeida-Sanchez* v. *United States* 413 U. S. 266, 279–280 (1973) (POWELL, J., concurring); *United States* v. *United States District Court*, 407 U. S. 297, 314–321 (1972); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971). On more than one occasion this Court has rejected an argument that a law enforcement officer's own probable cause to search a private place for contraband or evidence of crime should excuse his otherwise unexplained failure to procure a warrant beforehand. *Id.*, at 450; *Katz* v. *United States*, 389 U. S. 347, 356–358

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such an arrest presents no danger that an innocent person might be ensnared, since the officer observes both the crime and the culprit with his own eyes; there thus would be no reason to require a warrant in that particular situation even if there might be in others. *Trupiano* v. *United States*, 334 U. S. 699, 705 (1948). Another case cited by the Court, *Carroll* v. *United States*, 267 U. S. 132 (1925), involved no challenge to an arrest. Nor did *Abel* v. *United States*, 362 U. S. 217 (1960), in which the Court refused to consider petitioner's challenge to his arrest under less than a judicial warrant because of his failure to raise the issue in the lower courts. See *id.*, at 230–232. Finally, in *Ker* v. *California*, 374 U. S. 23 (1963), the Court addressed only the questions of whether there was probable cause for arrest and whether the method of entry for the purpose of arrest was reasonable; no issue arose as to whether a warrant was necessary for either the arrest or the entry.

(1967). In short, the course of judicial development of the Fourth Amendment with respect to searches has remained true to the principles so well expressed by Mr. Justice Jackson:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948).

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, see *Gerstein, supra,* no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred. See *Chimel* v. *California*, 395 U. S. 752, 776 (1969) (WHITE, J., dissenting); cf. *United States* v.

Robinson, 414 U. S. 218, 237–238 (1973) (POWELL, J., concurring). Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.

But logic sometimes must defer to history and experience. The Court's opinion emphasizes the historical sanction accorded warrantless felony arrests. In the early days of the common law most felony arrests were made upon personal knowledge and without warrants. So established were such arrests as the usual practice that Lord Coke seriously questioned whether a justice of the peace, receiving his information secondhand instead of from personal knowledge, even could authorize an arrest by warrant. 4 E. Coke, Institutes 177 (6th ed. 1681). By the late 18th century it had been firmly established by Blackstone, with an intervening assist from Sir Matthew Hale, that magistrates could issue arrest warrants upon information supplied by others. 4 W. Blackstone, Commentaries *290; see 2 M. Hale, Pleas of the Crown *108–110. But recognition of the warrant power cast no doubt upon the validity of warrantless felony arrests, which continued to be practiced and upheld as before. 4 W. Blackstone, *supra*, at *282; 1 J. Chitty, Criminal Law *14–15. There is no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers. See N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 79–105 (1937); cf. *Gerstein* v. *Pugh*, 420 U. S., at 114–116. As the Court today notes, the Second Congress' passage of an Act authorizing such arrests [2] so soon after the adoption of the Fourth Amend-

[2] Act of May 2, 1792, c. 18, § 9, 1 Stat. 265; see 28 U. S. C. § 570.

ment itself underscores the probability that the constitutional provision was intended to restrict entirely different practices.

The historical momentum for acceptance of warrantless arrests, already strong at the adoption of the Fourth Amendment, has gained strength during the ensuing two centuries. Both the judiciary and the legislative bodies of this Nation repeatedly have placed their imprimaturs upon the practice and, as the Government emphasizes, law enforcement agencies have developed their investigative and arrest procedures upon an assumption that warrantless arrests were valid so long as based upon probable cause. The decision of the Court of Appeals in this case was virtually unprecedented.[3] Of course, no practice that is inconsistent with constitutional protections can be saved merely by appeal to previous uncritical acceptance. But the warrantless felony arrest, long preferred at common law and unimpeached at the passage of the Fourth Amendment, is not such a practice. Given the revolutionary implications of such a holding, a declaration at this late date that warrantless felony arrests are constitutionally infirm would have to rest upon reasons more substantial than a desire to harmonize the rules for arrest with those governing searches. Cf. *United States* v. *Robinson, supra,* at 230.

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[3] Respondent has cited no other decision, state or federal, in support of the Court of Appeals' result in this case. The Government stated in its petition that the decision below was the first of which it was aware that required a warrant for an arrest in a public place. The Court of Appeals relied upon part of this Court's discussion in *Coolidge* v. *New Hampshire,* 403 U. S. 443, 480–481 (1971), but as other courts have recognized, that discussion had nothing to do with warrantless arrests in public places. See, *e. g., United States* v. *Miles,* 468 F. 2d 482, 486–487, and n. 6 (CA3 1972); *United States* v. *Bazinet,* 462 F. 2d 982, 987 (CA8), cert. denied *sub nom. Knox* v. *United States,* 409 U. S. 1010 (1972).

Moreover, a constitutional rule permitting felony arrests only with a warrant or in exigent circumstances could severely hamper effective law enforcement. Good police practice often requires postponing an arrest, even after probable cause has been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury.[4] Under the holding of the Court of Appeals such additional investigative work could imperil the entire prosecution. Should the officers fail to obtain a warrant initially, and later be required by unforeseen circumstances to arrest immediately with no chance to procure a last-minute warrant, they would risk a court decision that the subsequent exigency did not excuse their failure to get a warrant in the interim since they first developed probable cause. If the officers attempted to meet such a contin-

[4] This Court has not attempted a more precise definition of probable cause than the one in *Carroll* v. *United States*, 267 U. S., at 161, where the standard was affirmed as "facts and circumstances . . . such as to warrant a man of [reasonable] prudence and caution in believing that the offense has been committed" and, of course, that the person to be arrested was the offender. See generally *Henry* v. *United States*, 361 U. S., at 100–102. Whatever evidence may be necessary to establish probable cause in a given case, however, it is clear that it never need rise to the level required to prove guilt beyond a reasonable doubt. *Id.*, at 102; *Draper* v. *United States*, 358 U. S., at 311–312, and n. 4. The different standards for arrest and conviction reflect a recognition of society's valid interest in the earliest detention of suspected criminals that is consistent with the individual's interest in freedom from arbitrary interference with his liberty. See *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949). But society's equally valid interest in ultimate conviction of the guilty requires the police sometimes to continue their investigation after establishing probable cause to arrest, even if doing so means they have to leave a suspect at large pending such investigation. See generally ALI, A Model Code of Pre-arraignment Procedure § 120.1, Commentary, pp. 289, 292–296 (1975).

gency by procuring a warrant as soon as they had probable cause and then merely held it during their subsequent investigation, they would risk a court decision that the warrant had grown stale by the time it was used.[5] Law enforcement personnel caught in this squeeze could ensure validity of their arrests only by obtaining a warrant and arresting as soon as probable cause existed, thereby foreclosing the possibility of gathering vital additional evidence from the suspect's continued actions.

In sum, the historical and policy reasons sketched above fully justify the Court's sustaining of a warrantless arrest upon probable cause, despite the resulting divergence between the constitutional rule governing searches and that now held applicable to seizures of the person.[6]

II

Finally, I share the view expressed in the opinion of MR. JUSTICE STEWART. It makes clear that we do not today consider or decide whether or under what circum-

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[5] The probable cause to support issuance of an arrest warrant normally would not grow stale as easily as that which supports a warrant to search a particular place for particular objects. This is true because once there is probable cause to believe that someone is a felon the passage of time often will bring new supporting evidence. But in some cases the original grounds supporting the warrant could be disproved by subsequent investigation that at the same time turns up wholly new evidence supporting probable cause on a different theory. In those cases the warrant could be stale because based upon discredited information.

[6] I do not understand today's decision to suggest any retreat from our longstanding position that such an arrest should receive careful judicial scrutiny if challenged. "An arrest without a warrant bypasses the safeguards provided by an objective determination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest . . . , too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964).

stances an officer lawfully may make a warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy.[7]

MR. JUSTICE STEWART, concurring in the result.

The arrest in this case was made upon probable cause in a public place in broad daylight. The Court holds that this arrest did not violate the Fourth Amendment, and I agree. The Court does *not* decide, nor could it decide in this case, whether or under what circumstances an officer must obtain a warrant before he may lawfully enter a private place to effect an arrest. See *Gerstein* v. *Pugh*, 420 U. S. 103, 113 n. 13; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474–481; *Davis* v. *Mississippi*, 394 U. S. 721, 728; *Jones* v. *United States*, 357 U. S. 493, 499–500.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

By granting police broad powers to make warrantless arrests, the Court today sharply reverses the course of our modern decisions construing the Warrant Clause of the Fourth Amendment. The Court turns next to the consent-to-search question last dealt with in *Schneckloth*

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[7] Compare *Dorman* v. *United States*, 140 U. S. App. D. C. 313, 318–319, 435 F. 2d 385, 390–391 (1970) (en banc) (warrant required, absent exigent circumstances, for entry into a suspect's home for purpose of arrest), with *People* v. *Eddington*, 23 Mich. App. 210, 178 N. W. 2d 686 (1970), aff'd, 387 Mich. 551, 198 N. W. 2d 297 (1972) (only probable cause to arrest needed to enter suspect's home if there is a reasonable belief that he is there). Compare *England* v. *State*, 488 P. 2d 1347 (Okla. Crim. 1971) (search warrant needed to enter residence of third party to arrest suspect), with *United States* v. *Brown*, 151 U. S. App. D. C. 365, 369, 467 F. 2d 419, 423 (1972) (only an arrest warrant, plus reasonable belief that the suspect is present, necessary to support entry onto third party's premises).

v. *Bustamonte*, 412 U. S. 218 (1973). Without acknowledgment or analysis, the Court extends the scope of that decision to the situation expressly reserved in *Schneckloth*, and creates a rule inconsistent with *Schneckloth*'s own analysis. The Court takes both steps with a remarkable lack of consideration of either the facts of this case or the constitutional questions it is deciding. That is unfortunate not only because, in my view, the Court decides the constitutional questions wrongly, but also because consideration would have shown that the first question decided today is not raised by the facts before us, and that the second question should not be resolved here, given the present posture of this case. I respectfully dissent.

I

Before addressing what the Court does today, I note what it does not do. It does not decide this case on the narrow question that is presented. That is unfortunate for this is, fundamentally, a simple case.

On the afternoon of August 23, 1972, Awad Khoury, an informant of proved reliability, met with respondent Watson at a public restaurant under the surveillance of two postal inspectors. Khoury was under instructions to light a cigarette as a signal to the watching agents if Watson was in possession of stolen credit cards. Khoury lit a cigarette, and the postal inspectors moved in, made the arrest, and, ultimately, discovered under the floor mat of Watson's automobile the stolen credit cards that formed the basis of Watson's conviction and this appeal.

The signal of the reliable informant that Watson was in possession of stolen credit cards gave the postal inspectors probable cause to make the arrest. This probable cause was separate and distinct from the probable cause relating to the offense six days earlier, and provided an

adequate independent basis for the arrest. Whether or not a warrant ordinarily is required prior to making an arrest, no warrant is required when exigent circumstances are present. When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause the escape of the suspect or the destruction of the evidence. Accordingly, Watson's warrantless arrest was valid under the recognized exigent-circumstances exception to the warrant requirement, and the Court has no occasion to consider whether a warrant would otherwise be necessary.[1]

This conclusion should properly dispose of the case before us. As the Court observes, *ante*, at 414, the Court of Appeals relied heavily on the supposed illegality of Watson's arrest in ruling that his consent to the search of his car was coerced. Neither the opinion of the Court of Appeals nor the briefs of the parties here address the remaining issue of the circumstances under which consent to search given by a suspect *lawfully* in custody may be deemed coerced. Since that issue is both complex and

[1] The Court of Appeals did not recognize this independent probable cause to arrest petitioner, perhaps because one of the arresting officers testified that the arrest was made for the earlier, rather than the contemporaneous, offense. App. 23–24. That testimony should not limit the inquiry into contemporaneous probable cause. Where the good faith of the arresting officers is not at issue, and where the crime for which a suspect is arrested and that for which the officers have probable cause are closely related, courts typically use an objective rather than subjective measure of probable cause. *Ramirez* v. *Rodriguez*, 467 F. 2d 822 (CA10 1972); *United States* v. *Martinez*, 465 F. 2d 79 (CA2 1972); *United States* v. *Atkinson*, 450 F. 2d 835, 838 (CA5 1971). Since the objective facts demonstrably show probable cause as to the contemporaneous offense as well as the earlier offense, Watson's arrest is properly justified by reference to those facts.

expressly reserved in *Schneckloth* v. *Bustamonte, supra,* I think it inappropriate for resolution without the benefit of the views of the parties and the Court of Appeals. Accordingly, I would reverse the Court of Appeals on the legality of the arrest, vacate its judgment, and remand the case to that court for further proceedings.

II

Since, for reasons it leaves unexpressed, the Court does not take this traditional course, I am constrained to express my views on the issues it unnecessarily decides. The Court reaches its conclusion that a warrant is not necessary for a police officer to make an arrest in a public place, so long as he has probable cause to believe a felony has been committed, on the basis of its views of precedent and history. As my Brother POWELL correctly observes, *ante,* at 426–427, n. 1 (concurring), the precedent is spurious. None of the cases cited by the Court squarely confronted the issue decided today. Moreover, an examination of the history relied on by the Court shows that it does not support the conclusion laid upon it. After showing why, in my view, the Court's rationale does not support today's result, I shall examine the relevant decisions and suggest what I believe to be the proper rule for arrests.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

There is no doubt that by the reference to the seizure of persons, the Fourth Amendment was intended to

apply to arrests. *Ex parte Burford,* 3 Cranch 448 (1806). See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 79–82 (1937). Indeed, we have often considered whether arrests were made in conformity with the Fourth Amendment. *E. g., Beck* v. *Ohio,* 379 U. S. 89 (1964); *Ker* v. *California,* 374 U. S. 23 (1963); *Draper* v. *United States,* 358 U. S. 307 (1959); *Giordenello* v. *United States,* 357 U. S. 480 (1958). Admittedly, as the Court observes, some of our decisions make passing reference to the common-law rule on arrests. *E. g., Carroll* v. *United States,* 267 U. S. 132, 156 (1925); *Bad Elk* v. *United States,* 177 U. S. 529, 534 (1900); *Kurtz* v. *Moffitt,* 115 U. S. 487, 498–499 (1885). However, none of the cases cited by the Court, nor any other warrantless arrest case in this Court, mandates the decision announced today. Frequently exigent circumstances were present, so that the warrantless arrest was proper even if a warrant ordinarily may be required. *Ker* v. *California, supra; Draper* v. *United States, supra; United States* v. *Di Re,* 332 U. S. 581 (1948). Many cases have invalidated arrests as not based on probable cause, thereby bypassing the need to reach the warrant question. *E. g., Beck* v. *Ohio, supra; Henry* v. *United States,* 361 U. S. 98 (1959). Elsewhere the Court has simply assumed the propriety of the arrest and resolved the case before it on other grounds. *Chimel* v. *California,* 395 U. S. 752 (1969). Cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 476 (1971). And in other cases, the Court noted, but did not reach, the warrantless-arrest issue, *E. g., Giordenello* v. *United States, supra.* In sum, as the case-by-case analysis undertaken by my Brother POWELL demonstrates, the dicta relied upon by the Court in support of its decision today are just that—dicta. See *ante,* at 426–427, n. 1 (concurring). They are no substitute

for reasoned analysis of the relationship between the warrant requirement and the law of arrest.

The Court next turns to history. It relies on the English common-law rule of arrest and the many state and federal statutes following it. There are two serious flaws in this approach. First, as a matter of factual analysis, the substance of the ancient common-law rule provides no support for the far-reaching modern rule that the Court fashions on its model. Second, as a matter of doctrine, the longstanding existence of a Government practice does not immunize the practice from scrutiny under the mandate of our Constitution.

The common-law rule was indeed as the Court states it:

> "[A] peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest." *Ante,* at 418, and sources cited.

See also *Kurtz* v. *Moffitt, supra; Bad Elk* v. *United States, supra.* To apply the rule blindly today, however, makes as much sense as attempting to interpret Hamlet's admonition to Ophelia, "Get thee to a nunnery, go," [2] without understanding the meaning of Hamlet's words in the context of their age.[3] For the fact is that a felony at common law and a felony today bear only slight resemblance, with the result that the relevance of the common-law rule of arrest to the modern interpretation of our Constitution is minimal.

Both at common law and today, felonies find definition in the penal consequences of crime rather than the

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[2] W. Shakespeare, Hamlet, act iii, sc. 1, line 142.

[3] Nunnery was Elizabethan slang for house of prostitution. 7 Oxford English Dictionary 264 (1933).

nature of the crime itself. At common law, as this Court has several times recognized,

> "No crime was considered a felony which did not occasion a total forfeiture of the offender's lands, or goods, or both." *Kurtz* v. *Moffitt,* 115 U. S., at 499.

See also *Ex parte Wilson,* 114 U. S. 417, 423 (1885); 4 W. Blackstone, Commentaries *95.[4] At present, on the other hand,

> "Any offense punishable by death or imprisonment for a term exceeding one year is a felony." 18 U. S. C. § 1 (1).[5]

This difference reflects more than changing notions of penology. It reflects a substantive change in the kinds of crimes called felonies. *Carroll* v. *United States,* 267 U. S., at 158.[6] Only the most serious crimes were felonies at common law, and many crimes now clas-

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[4] Professor Wilgus has defined felonies at common law as

"those bootless crimes, prosecuted by an appeal with an offer of trial by battle, the felon's lands to go to his lord or the king, his chattels confiscated, and life and members forfeited, if guilty, and if he fled he became an outlaw . . . ." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 569 (1924).

[5] In the States the most common rule is that any crime punishable by death or imprisonment in the state prison is a felony. See *id.,* at 571. See also, *e. g.,* Ark. Stat. Ann. § 41–103 (1964); 22 Fla. Stat. Ann. § 775.08 (Supp. 1975); Ill. Ann. Stat. § 2–7 (Supp. 1975); Ky. Rev. Stat. Ann. § 431.060 (1970); Mass. Gen. Laws Ann., c. 274, § 1 (1970); Okla. Stat. Ann., Tit. 21, § 5 (1958); Wash. Rev. Code § 9.01.020 (1974).

[6] "In England at the common law the difference in punishment between felonies and misdemeanors was very great. Under our present federal statutes, it is much less important and Congress may exercise a relatively wide discretion in classing particular offenses as felonies or misdemeanors." *Carroll* v. *United States,* 267 U. S., at 158.

sified as felonies under federal or state law were treated as misdemeanors. Professor Wilgus has summarized and documented the cases:

> "At common law an assault was a misdemeanor and it was still only such even if made with the intent to rob, murder, or rape. Affrays, abortion, barratry, bribing voters, challenging to fight, compounding felonies, cheating by false weights or measures, escaping from lawful arrest, eavesdropping, forgery, false imprisonment, forcible and violent entry, forestalling, kidnapping, libel, mayhem, maliciously killing valuable animals, obstructing justice, public nuisance, perjury, riots and routs, etc. were misdemeanors . . . ." Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 572–573 (1924) (footnotes omitted).

See also 9 Halsbury's Laws of England 450–793 (1909).[7] To make an arrest for any of these crimes at common law, the police officer was required to obtain a warrant, unless the crime was committed in his presence.[8] Since many of these same crimes are commonly classified as felonies today,[9] however, under the Court's holding a

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[7] Indeed, by statute, it was no more than a high misdemeanor wilfully to discharge or attempt to discharge a pistol at or near the King of England. 9 Halsbury's Laws of England 459 (1909). Cf. 18 U. S. C. § 871 (felony to make threats against President of United States); § 1751 (felony to assault President of United States).

[8] This exception was essentially a narrowly drawn exigent-circumstances exception. See *Carroll* v. *United States, supra,* at 157.

[9] For example, under federal law these are some of the common-law misdemeanors, or their modern equivalents, now considered felonies: assault, 18 U. S. C. §§ 111–112; assault with intent to commit murder, rape or any other felony, § 113; forging securities of the United States, § 471; bribing voters, § 597; escape, § 751; kidnaping, § 1201; obstruction of congressional or executive investi-

warrant is no longer needed to make such arrests, a result in contravention of the common law.

Thus the lesson of the common law, and those courts in this country that have accepted its rule, is an ambiguous one. Applied in its original context, the common-law rule would allow the warrantless arrest of some, but not all, of those we call felons today. Accordingly, the Court is simply historically wrong when it tells us that "[t]he balance struck by the common law in generally authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact." *Ante*, at 421. As a matter of substance, the balance struck by the

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gations, § 1505; obstruction of criminal investigations, § 1510; perjury, § 1621; riots, § 2101; interception of wire or oral communications, § 2511.

See also, *e. g.*, Ark. Stat. Ann. § 41–606 (1964) (assault with intent to kill); § 41–607 (assault with intent to rape); § 41–1805 (forgery); § 41–3005 (perjury); § 41–2308 (Supp. 1973) (kidnaping).

Fla. Stat. Ann. § 787.02 (Supp. 1975) (false imprisonment); § 831.01 (Supp. 1975) (forgery); § 837.012 (Supp. 1975) (perjury); § 843.14 (Supp. 1975) (compounding felonies); § 870.03 (Supp. 1975) (riots and routs).

Ill. Ann. Stat. § 10–1 (Supp. 1975) (kidnaping); § 14–4 (eavesdropping); § 33–1 (Supp. 1975) (bribery); § 32–2 (Supp. 1975) (perjury).

Ky. Rev. Stat. § 520.020 (1975) (escape); § 516.020 (1975) (forgery); § 509.020 (1975) (kidnaping); § 515.020 (1975) (assault with intent to rob); § 523.020 (1975) (perjury).

Mass. Gen. Laws Ann., c. 265, § 29 (1970) (assault with intent to commit a felony); c. 268, § 36 (compounding felonies); c. 268, § 13B (obstructing justice); c. 267, § 1 (Supp. 1975) (forgery); c. 272, § 99 (interception of wire and oral communications); c. 268, § 16 (Supp. 1975) (escape); c. 265, § 26 (Supp. 1975) (kidnaping).

Okla. Stat. Ann., Tit. 21, § 443 (Supp. 1975) (escape); § 499 (1958) (perjury); § 653 (Supp. 1975) (assault with intent to kill); § 1312 (1958) (riot); § 1621 (1958) (forgery). Wash. Rev. Code § 9.11.010 (1974) (assault with intent to commit a felony); § 9.27.-050 (riot); § 9.31.010 (escape); § 9.44.020 (forgery); § 9.52.010 (kidnaping); § 9.72.010 (perjury).

common law in accommodating the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy decreed that only in the most serious of cases could the warrant be dispensed with. This balance is not recognized when the common-law rule is unthinkingly transposed to our present classifications of criminal offenses. Indeed, the only clear lesson of history is contrary to the one the Court draws: the common law considered the arrest warrant far more important than today's decision leaves it.

I do not mean by this that a modern warrant requirement should apply only to arrests precisely analogous to common-law misdemeanors, and be inapplicable to analogues of common-law felonies. Rather, the point is simply that the Court's unblinking literalism cannot replace analysis of the constitutional interests involved. While we can learn from the common law, the ancient rule does not provide a simple answer directly transferable to our system. Thus, in considering the applicability of the common-law rule to our present constitutional scheme, we must consider *both* of the rule's two opposing constructs: the presumption favoring warrants, as well as the exception allowing immediate arrests of the most dangerous criminals. The Court's failure to do so, indeed its failure to recognize any tension in the common-law rule at all, drains all validity from its historical analysis.

Lastly, the Court relies on the numerous state and federal statutes codifying the common-law rule. But this, too, is no substitute for reasoned analysis. True enough, the national and state legislatures have steadily ratified the drift of the balance struck by the common-law rule past the bounds of its original intent. And it is true as well, as the Court observes, that a presumption of constitutionality attaches to every Act of Congress. But neither observation is determinative of the constitutional issue,

and the doctrine of deference that the Court invokes is contrary to the principles of constitutional analysis practiced since *Marbury* v. *Madison,* 1 Cranch 137 (1803). The Court's error on this score is far more dangerous than its misreading of history, for it is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice. "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz* v. *Tax Comm'n,* 397 U. S. 664, 678 (1970). See also *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1973); *Roe* v. *Wade,* 410 U. S. 113 (1973); *Furman* v. *Georgia,* 408 U. S. 238 (1972); *Reynolds* v. *Sims,* 377 U. S. 533 (1964).[10] Our function in constitutional cases is weightier than the Court today suggests: where reasoned analysis shows a practice to be constitutionally deficient, our obligation is to the Constitution, not the Congress.

In sum, the Court's opinion is without foundation. It relies on precedents that are not precedents. It relies on history that offers no clear rule to impose, but only conflicting interests to balance. It relies on statutes that constitute, at best, no more than an aid to construction. The Court never grapples with the warrant requirement of the Fourth Amendment and the cases construing it. It simply announces, by *ipse dixit,* a rule squarely rejecting the warrant requirement we have favored for so long.

III

My Brother POWELL concludes: "Logic . . . would seem to dictate that arrests be subject to the warrant

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[10] "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez* v. *United States,* 413 U. S., at 272.

requirement at least to the same extent as searches." *Ante*, at 429 (concurring). I agree.

One of the few absolutes of our law is the requirement that, absent the presence of one of a few "jealously and carefully drawn" exceptions, *Jones* v. *United States*, 357 U. S. 493, 499 (1958), a warrant be obtained prior to any search.[11] "[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' [within the meaning of the Fourth Amendment] unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). See *Cady* v. *Dombrowski*, 413 U. S. 433, 439 (1973); *United States* v. *United States District Court*, 407 U. S. 297, 315–316, 318 (1972); *Coolidge* v. *New Hampshire*, 403 U. S., at 454–455; *Chimel* v. *California*, 395 U. S., at 762; *Terry* v. *Ohio*, 392 U. S. 1 (1968); *Katz* v. *United States*, 389 U. S. 347, 357 (1967).

The rule the Court announces today for arrests is the reverse of this approach. It is, in essence, the *Rabinowitz* rule: "The relevant test is not whether it is reasonable to procure [an arrest] warrant, but whether the [arrest] was reasonable." *United States* v. *Rabinowitz*, 339 U. S. 56, 66 (1950). In the search context, *Rabinowitz* has been overruled, *Chimel* v. *California*, *supra*, at 764–768, and thoroughly discredited, see, *e. g.*, *United States* v. *United States District Court*, *supra*, at 315, and n. 16. The *Rabinowitz* approach simply does not provide adequate protection for the important personal privacy interests codified in the

[11] "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357 (1967).

Fourth Amendment. Given "[t]he history of the use, and not infrequent abuse, of the power to arrest," *Wong Sun* v. *United States,* 371 U. S. 471, 479 (1963), and the fact that arrests are, in terms, as fully governed by the Fourth Amendment as searches, the logical presumption is that arrests and searches should be treated equally under the Fourth Amendment. Analysis of the interests involved confirms this supposition.

The Court has typically engaged in a two-part analysis in deciding whether the presumption favoring a warrant should be given effect in situations where a warrant has not previously been clearly required. Utilizing that approach we must now consider (1) whether the privacy of our citizens will be better protected by ordinarily requiring a warrant to be issued before they may be arrested; and (2) whether a warrant requirement would unduly burden legitimate governmental interests. *United States* v. *United States District Court, supra,* at 315; *Camara* v. *Municipal Court, supra,* at 533.

The first question is easily answered. Of course, the privacy of our citizens will be better protected by a warrant requirement. We have recognized that "the Fourth Amendment protects people, not places." *Katz* v. *United States, supra,* at 351. Indeed, the privacy guaranteed by the Fourth Amendment is quintessentially personal. Cf. *Roe* v. *Wade, supra; Doe* v. *Bolton,* 410 U. S. 179 (1973); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Thus a warrant is required in search situations not because of some high regard for property, but because of our regard for the individual, and *his* interest in his possessions and person.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and

> private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment [in the classic English warrant case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765)]." *Boyd* v. *United States*, 116 U. S. 616, 630 (1886).

Not only is the Fourth Amendment directly addressed to the privacy of our citizens, but it speaks in indistinguishable terms about the freedom of both persons and property from unreasonable seizures. A warrant is required in the search situation to protect the privacy of the individual, but there can be no less invasion of privacy when the individual himself, rather than his property, is searched and seized. Indeed, an unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and interrupts the course of his daily business may be more intrusive than an unjustified search.

> "Being arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening. Unlike other occasions on which one may be authoritatively required to be somewhere or do something, an arrest abruptly subjects a person to constraint, and removes him to unfamiliar and threatening surroundings. Moreover, this exercise of control over the person depends not just on his willingness to comply with an impersonal directive, such as a summons or subpoena, but on an order which a policeman issues on the spot and stands ready then and there to back up with force. The security of the individual requires that so abrupt and intrusive an authority be granted to public officials only on a guarded basis." ALI, Model Code

of Pre-arraignment Procedure, Commentary 290–291 (1975).

A warrant requirement for arrests would, of course, minimize the possibility that such an intrusion into the individual's sacred sphere of personal privacy would occur on less than probable cause. Primarily for this reason, a warrant is required for searches. Surely there is no reason to place greater trust in the partisan assessment of a police officer that there is probable cause for an arrest than in his determination that probable cause exists for a search.[12] Last Term the Court unanimously recog-

[12] In fact, the reasons relating to personal privacy so often itemized by the Court in requiring a warrant to search appear to apply with equal force to arrests. In *Johnson* v. *United States*, 333 U. S. 10 (1948), Mr. Justice Jackson laid down the reasons for a search warrant in these classic lines:

"The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Id.*, at 13–14.

Substitute "arrest" for "search" and replace references to the home with references to the person, and the justification for an arrest warrant compellingly emerges.

nized that detention of a person cannot be prolonged without judicial oversight of the probable-cause determination. *Gerstein* v. *Pugh*, 420 U. S. 103 (1975). But while *Gerstein* may provide the best protection possible against less-than-probable-cause warrantless arrests based on exigent circumstances, it does not fully protect the Fourth Amendment rights at stake here. A less-than-probable-cause arrest followed by a *Gerstein* release is as offensive to the Fourth Amendment as a less-than-probable-cause search that fails to uncover the evidence sought, and the requirement of a warrant is as instrumental in protecting against the one as the other. Indeed, the Court's opinion in *Gerstein* expressly recognizes that maximum protection of individual rights can only be realized "by requiring a magistrate's review of the factual justification prior to any arrest . . . ." *Id.*, at 113.

We come then to the second part of the warrant test: whether a warrant requirement would unduly burden legitimate law enforcement interests. Dicta in *Gerstein* answer this question in the affirmative, and these concerns are somewhat amplified in the concurrence of my Brother POWELL. *Ante*, at 431–432. I believe, however, that the suggested concerns are wholly illusory. Indeed, the argument that a warrant requirement for arrests would be an onerous chore for the police seems somewhat anomalous in light of the Government's concession that "it is the standard practice of the Federal Bureau of Investigation [FBI] to present its evidence to the United States Attorney, and to obtain a warrant, before making an arrest." Brief for United States 26 n. 15. In the past, the practice and experience of the FBI have been taken as a substantial indication that no intolerable burden would be presented by a proposed rule of procedure. *Miranda* v. *Arizona*, 384 U. S. 436, 483–486 (1966).

There is no reason to accord less deference to the FBI practice here.[13]

The Government's assertion that a warrant requirement would impose an intolerable burden stems, in large part, from the specious supposition that procurement of an arrest warrant would be necessary as soon as probable cause ripens. Brief for United States 22–24. There is no requirement that a search warrant be obtained the moment police have probable cause to search. The rule is only that present probable cause be shown and a warrant obtained before a search is undertaken.[14] Fed. Rule Crim. Proc. 41. Cf. *Berger* v. *New York*, 388 U. S. 41, 59 (1967). The same rule should obtain for arrest warrants, where it may even make more sense. Certainly, there is less need for prompt procurement of a warrant in the arrest situation. Unlike probable cause to search, probable cause to arrest, once formed, will continue to exist for the indefinite future, at least if no intervening exculpatory facts come to light. See *Wilson* v. *United States*, 117 U. S. App. D. C. 28, 325 F. 2d 224 (1963), cert. denied, 377 U. S. 1005 (1964), and

[13] The *Miranda* Court rejected as irrelevant the argument that the FBI deals with crimes different from those dealt with by state authorities. 384 U. S., at 486.

[14] The police will, however, encounter problems of "staleness" of their information if they delay too long in seeking a search warrant. *E. g., Sgro* v. *United States*, 287 U. S. 206 (1932); *United States* v. *Sawyer*, 213 F. Supp. 38, 40 (ED Pa. 1963). See generally Annot., 100 A. L. R. 2d 525 (1965). But see *People* v. *Wright*, 367 Mich. 611, 116 N. W. 2d 786 (1962). This problem relates, however, to the existence at the time the warrant is applied for of probable cause to believe the object to be seized remains where it was, not to whether the earlier probable cause mandated immediate application for a warrant. Mascolo, The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness, 43 Conn. B. J. 189 (1969). This problem has no bearing, of course, in connection with a warrant to arrest.

United States v. *Wilson*, 342 F. 2d 782 (CA2 1965) (both upholding delay of 16 months between formation of probable cause and issuance of arrest warrant). Cf. *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966).

This sensible approach obviates most of the difficulties that have been suggested with an arrest warrant rule. Police would not have to cut their investigation short the moment they obtain probable cause to arrest, nor would undercover agents be forced suddenly to terminate their work and forfeit their covers. *Godfrey* v. *United States*, 123 U. S. App. D. C. 219, 358 F. 2d 850 (1966). Moreover, if in the course of the continued police investigation exigent circumstances develop that demand an immediate arrest, the arrest may be made without fear of unconstitutionality, so long as the exigency was unanticipated and not used to avoid the arrest warrant requirement. Cf. *Coolidge* v. *New Hampshire*, 403 U. S., at 469–471 (evidence may be seized if in plain view only if its discovery is inadvertent). Likewise, if in the course of the continued investigation police uncover evidence tying the suspect to another crime, they may immediately arrest him for that crime if exigency demands it, and still be in full conformity with the warrant rule. This is why the arrest in this case was not improper.[15] Other than where police attempt to evade the warrant requirement, the rule would invalidate an arrest only in the obvious situation: where police, with probable cause but without exigent circumstances, set out to arrest a suspect. Such an arrest must be void, even if exigency develops in the course of the arrest that

[15] Although the postal inspectors here anticipated the occurrence of the second crime, they could not have obtained a warrant for Watson's arrest for that crime until probable cause formed, just moments before the arrest. A warrant based on anticipated facts is premature and void. *United States* v. *Roberts*, 333 F. Supp. 786 (ED Tenn. 1971).

would ordinarily validate it; otherwise the warrant requirement would be reduced to a toothless prescription.

In sum, the requirement that officers about to arrest a suspect ordinarily obtain a warrant before they do so does not seem unduly burdensome, at least no more burdensome than any other requirement that law enforcement officials undertake a new procedure in order to comply with the dictates of the Constitution. Cf. *Gerstein* v. *Pugh,* 420 U. S. 103 (1975); *United States* v. *Wade,* 388 U. S. 218 (1967); *Gilbert* v. *California,* 388 U. S. 263 (1967); *Miranda* v. *Arizona, supra; Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

It is suggested, however, that even if application of this rule does not require police to secure a warrant as soon as they obtain probable cause, the confused officer would nonetheless be prone to do so. If so, police "would risk a court decision that the warrant had grown stale by the time it was used." *Ante,* at 432 (POWELL, J., concurring) (footnote omitted). This fear is groundless. First, as suggested above, the requirement that police procure a warrant before an arrest is made is rather simple of application. Thus, there is no need for the police to find themselves in this "squeeze." Second, the "squeeze" is nonexistent. Just as it is virtually impossible for probable cause for an arrest to grow stale between the time of formation and the time a warrant is procured, it is virtually impossible for probable cause to become stale between procurement and arrest.[16] Delay by law enforcement officers in executing an arrest warrant does not ordinarily affect the legality of the arrest.[17]

[16] Thus, unlike a search warrant, an arrest warrant typically does not require execution within a specified time period or "forthwith." Compare Fed. Rule Crim. Proc. 41 (c) with Rules 4 and 9.

[17] Pre-arrest delay may violate a defendant's due process rights and cause dismissal of the charges if the delay is such as to impair the defendant's ability to defend himself or is deliberate and

United States v. *Wilson, supra; Wilson* v. *United States, supra; Carlo* v. *United States,* 286 F. 2d 841, 846 (CA2), cert. denied, 366 U. S. 944 (1961); *United States* v. *Joines,* 258 F. 2d 471 (CA3), cert. denied, 358 U. S. 880 (1958); *Giordenello* v. *United States,* 241 F. 2d 575 (CA5 1957), rev'd on other grounds, 357 U. S. 480 (1958). In short, staleness should be the least of an arresting officer's worries.[18]

Thus, the practical reasons marshaled against an arrest warrant requirement are unimpressive.[19] If anything, the virtual nonexistence of a staleness problem suggests that such a requirement would be less burdensome for police than the search warrant rule. And given the significant protection our citizens will gain from a warrant requirement, accepted Fourth Amend-

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unjustified. *United States* v. *Feinberg,* 383 F. 2d 60, 65 (CA2 1967), cert. denied, 389 U. S. 1044 (1968); *United States* v. *Harbin,* 377 F. 2d 78 (CA4 1967); *Godfrey* v. *United States,* 123 U. S. App. D. C. 219, 358 F. 2d 850 (1966); *Powell* v. *United States,* 122 U. S. App. D. C. 229, 231, 352 F. 2d 705, 707 (1965). The effect of such delay, however, is completely unrelated to the warrant question.

[18] It is suggested that staleness would be most serious in situations where the original probable cause justifying a warrant is undercut by exculpatory evidence, only to be reaffirmed by further inculpatory evidence. Why this should be a problem baffles me. It should be obvious that when the probable cause supporting a warrant no longer exists, the warrant is void and the suspect cannot be arrested. That probable cause is thereafter again found only tells us that, absent exigency, a subsequent warrant should be obtained, not that the void warrant should somehow be resurrected. Cf. *Sgro* v. *United States,* 287 U. S. 206 (1932).

[19] The fear that "endless litigation" will result from a warrant rule cannot be credited as an additional practical reason against such a rule. Cf. *ante,* at 423–424. Recognition of a constitutional right inevitably results in litigation to enforce that right. We would quickly lose all protection from our Constitution if it could successfully be argued that its guarantees should be ignored because if they were recognized our citizens would begin to assert them.

ment analysis dictates that a warrant rule be imposed. This conclusion, then, answers the questions posed by analysis of the common-law rule on arrest. In choosing between the common law's prescription that a warrant ordinarily be obtained for the arrest of persons suspected of committing less serious crimes, and the common-law exception allowing warrantless arrests of suspects in more serious offenses, the intervention of our Fourth Amendment and the cases developing its application necessarily favor the former approach. Thus, I believe the proper result is application of the warrant requirement, as it has developed in the search context, to all arrests.

IV

Accordingly, I dissent from the Court's contrary holding. It is always disheartening when the Court ignores a relevant body of precedent and eschews any considered analysis. It is more so when the result of such an approach is a rule that "leave[s] law-abiding citizens at the mercy of the officers' whim or caprice," *Brinegar* v. *United States*, 338 U. S. 160, 176 (1949), and renders the constitutional protection of our "persons" a nullity. The consequences of the Court's casually adopted rationale are clear.

First, the opinion all but answers the question raised in *Coolidge* v. *New Hampshire*, 403 U. S., at 480–481, namely, "whether and under what circumstances an officer may enter a suspect's home to make a warrantless arrest." *Gerstein* v. *Pugh*, 420 U. S., at 113 n. 13.[20]

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[20] The Court of Appeals relied on language from *Coolidge* v. *New Hampshire*, to support its conclusion that a warrant was required to arrest Watson:

"Indeed, if MR. JUSTICE WHITE is correct that it has generally been assumed that the Fourth Amendment is not violated by the

Admittedly, my Brothers STEWART and POWELL do not read the opinion to resolve that issue and, indeed, the Court purports to leave it open. *Ante,* at 418 n. 6. But the mode of analysis utilized here—reliance on the common law and federal and state statutes—provides a ready answer, as indeed the Court hints by its extended discussion of § 120.6 of the ALI Model Code of Pre-arraignment Procedure and its relevant commentary. *Ante,* at 418 n. 6. See also Wilgus, 22 Mich. L. Rev., at 800 ("For a felony . . . one may break into the dwelling house to take the felon . . ."); *id.,* at 558, 803; 9 Halsbury's Laws of England 307 (1909); 1 J. Chitty, Criminal Law *23; 4 W. Blackstone, Commentaries *292. Unless the approach of this opinion is to be fundamentally rejected, it will be difficult, if not impossible, to follow these sources to any but one conclusion—that entry to effect a warrantless arrest is permissible.

Second, by paying no attention whatever to the substance of the offense, and considering only whether it is labeled "felony," the Court, in the guise of "constitutionalizing" the common-law rule, actually does away with it altogether, replacing it with the rule that the police may, consistent with the Constitution, arrest on probable cause anyone who they believe has committed any sort of crime at all. Certainly this rule would follow

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warrantless entry of a man's house for purposes of arrest, it might be wise to re-examine the assumption. . . .

". . . The case of *Warden* v. *Hayden,* [387 U. S. 294 (1967),] where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." 403 U. S., at 480–481.

The Court is correct that this language relates only to the question reserved both in *Gerstein* v. *Pugh,* 420 U. S., at 113 n. 13, and in this case.

if the legislatures redenominated all crimes as "felonies." As a matter of substance, it would seem to follow in any event from the holding of this case, for the Court surely does not intend to accord constitutional status to a distinction that can be readily changed by legislative fiat.[21]

Lastly, the Court surrenders the opportunity to put teeth in our oft-expressed preference for the use of arrest warrants. *Beck* v. *Ohio*, 379 U. S., at 96; *Wong Sun* v. *United States*, 371 U. S., at 479–482. While some incentives for police to obtain arrest warrants remain,[22]

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[21] Thus the Court calls into question the line of state cases holding unconstitutional statutes authorizing warrantless arrests for misdemeanors not committed in the presence of the arresting officer. *In re Kellam*, 55 Kan. 700, 41 P. 960 (1895); *Robison* v. *Miner*, 68 Mich. 549, 37 N. W. 21 (1888); *Pinkerton* v. *Verberg*, 78 Mich. 573, 44 N. W. 579 (1889); *Gunderson* v. *Struebing*, 125 Wis. 173, 104 N. W. 149 (1905); *Ex parte Rhodes*, 79 So. 462 (Ala. 1918). Of course, such a result (or, indeed, the result I espouse herein) may still be sustained under the pertinent provisions of the state constitution. Cf. *Oregon* v. *Hass*, 420 U. S. 714, 726 (1975) (MARSHALL, J., dissenting).

[22] After today there are two primary incentives for the police to obtain an arrest warrant. First, the Court has suggested, but never held, that a stronger showing of probable cause may be needed to justify a warrantless arrest than would be required if a warrant had been obtained. *Wong Sun* v. *United States*, 371 U. S. 471, 479–480 (1963). Cf. *United States* v. *Ventresca*, 380 U. S. 102, 106 (1965) (searches). This two-tier standard of probable cause may prove too slippery for ready application, however, especially given the already imprecise definition of probable cause itself, *Carroll* v. *United States*, 267 U. S., at 161. What the Court intends, I suspect, is simply that the evidence of probable cause supporting a warrantless arrest will be subjected to closer scrutiny than that underlying a warrant-supported arrest.

The second incentive for police to obtain a warrant is that they may desire to present their evidence to a magistrate so as to be sure that they have probable cause. If probable cause is lacking, the police will then have an opportunity to gather more evidence

they are only indirect and have proved ineffective in the past in assuring routine application for arrest warrants when the circumstances permit it. By our holding today, the preference for an arrest warrant, which the Court has conceded is the optimal method to protect our citizens from the affront of an unlawful arrest, will remain only an ideal, one that the Court will espouse but not enforce.

V

Having disposed of the suggestion that the Fourth Amendment requires a warrant of arrest before the police may seize our persons, the Court turns its attention, briefly, to whether Watson voluntarily consented to the search of his automobile. I have suggested above that because this issue is of some complexity and has not been thoroughly briefed for us I would remand this case for initial consideration of the question by the Court of Appeals. The Court, however, finds the question simplicity itself. It applies the "totality of the circumstances" test established in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973), and treats the question as merely requiring the application of settled law to the facts before us.

That is not the case. Watson was in custody when his consent was obtained. The lack of custody was of decisional importance in *Schneckloth*, which repeatedly distinguished the case before it from one involving a suspect in custody. *Id.*, at 232, 240–241, and n. 29, 246–248, and n. 36. The Court held:

> "Our decision today is a narrow one. We hold only that *when the subject of a search is not in custody* and the State attempts to justify a search on the basis of his consent, the Fourth and Four-

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rather than make an illegal arrest that would result in suppression of any evidence seized.

> teenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Id.*, at 248 (emphasis added).

Not once, but twice, the question the Court today treats as settled was expressly reserved:

> "[T]he present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody." *Id.*, at 241 n. 29.

See also *id.*, at 247 n. 36.

I adhere to the views expressed in my dissent in *Schneckloth*, *id.*, at 277, and therefore believe that the Government must always show that a person who consented to a search did so knowing he had the right to refuse. But even short of this position, there are valid reasons for application of such a rule to consents procured from suspects held in custody. It was, apparently, the force of those reasons that prompted the Court in *Schneckloth* to reserve the question. Most significantly, we have previously accorded constitutional recognition to the distinction between custodial and noncustodial police contacts. *Miranda* v. *Arizona*, 384 U. S., at 477–478. Indeed, *Schneckloth* directly relied on *Miranda*'s articulation of that distinction to reach its conclusion. 412 U. S., at 232. Thus, while custodial interrogation is inherently coercive, and any consent thereby obtained necessarily suspect, *Miranda* (and *Schneckloth*) expressly reject the notion that there is anything inherently coercive about general noncustodial interrogation. 384 U. S., at 477–478; 412 U. S., at 247. For this reason it is entirely appropriate to place a substantially greater burden on the Government

to validate a consent obtained from a suspect following custodial interrogation, however brief. Indeed, it is difficult, if not impossible, to square a contrary conclusion with *Miranda*. A substantially greater burden on the Government means, quite obviously, that the fact of custody is not merely another factor to be considered in the "totality of the circumstances." [23] And, in my view, it means that the Government must show that the suspect knew he was not obligated to consent to the search.

Whether after due consideration the Court would accept this view or not, it is a surrender of our judicial task altogether to ignore the question. And, equally disturbing, it is a distortion of our precedent to pretend that what seemed a difficult and complex problem three years ago is no problem at all today.

I respectfully dissent.

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[23] Many Courts of Appeals have recognized that a custodial consent is different in kind from one obtained from a person not in custody, and have placed a stiff burden on the Government to validate the consent. *United States* v. *Rothman*, 492 F. 2d 1260, 1265 (CA9 1973); *United States* v. *Nikrasch*, 367 F. 2d 740, 744 (CA7 1966); *Judd* v. *United States*, 89 U. S. App. D. C. 64, 66, 190 F. 2d 649, 651 (1951).

Reporter's Note

The next page is purposely numbered 801. The numbers between 458 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM END OF OCTOBER TERM, 1974 THROUGH JANUARY 26, 1976

Cases Dismissed in Vacation

No. 74–6653. Bruce *v.* U. S. District Court for the Northern District of Texas. Motion for leave to file petition for writ of mandamus dismissed August 26, 1975, under this Court's Rule 60.

No. 74–6489. Guajardo et al. *v.* United States. C. A. 5th Cir. Certiorari dismissed as to petitioner Juan Chapa, Jr., on September 9, 1975, under this Court's Rule 60. Reported below: 508 F. 2d 1093.

No. 75–163. California & Hawaiian Sugar Co. et al. *v.* United States District Court for the Northern District of California et al. C. A. 9th Cir. Certiorari dismissed September 18, 1975, as to petitioners Union Sugar Division, Consolidated Foods Corp.; Amalgamated Sugar Co.; Great Western Sugar Co.; and Holly Sugar Corp. under this Court's Rule 60.

No. 74–1602. Politi et al. *v.* United States. C. A. 2d Cir. Certiorari dismissed September 25, 1975, under this Court's Rule 60. Reported below: 516 F. 2d 897.

No. 74–1490. S & H Packing Co., Inc. *v.* DeSaracho et al., dba Saracho Hnos. C. A. 9th Cir. Certiorari dismissed September 29, 1975, under this Court's Rule 60.

No. 74–1485. English *v.* Lawrence, U. S. District Judge, et al. C. A. 5th Cir. Certiorari dismissed October 1, 1975, under this Court's Rule 60.

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No. 74–1518. TELEX CORP. ET AL. *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 10th Cir. Certiorari dismissed October 3, 1975, under this Court's Rule 60. Reported below: 510 F. 2d 894.

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Affirmed on Appeal

No. 74–1324. GENDRON *v.* LEVI, ATTORNEY GENERAL, ET AL. Affirmed on appeal from D. C. C. D. Cal. Reported below: 389 F. Supp. 1303.

No. 74–1477. FAST MOTOR SERVICE, INC. *v.* UNITED STATES ET AL.; and

No. 74–1478. FAST MOTOR SERVICE, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. N. D. Ill.

No. 74–1553. WILKEY *v.* ILLINOIS RACING BOARD ET AL. Affirmed on appeal from D. C. N. D. Ill.

No. 74–6410. SPEARS *v.* ELLIS, DISTRICT ATTORNEY OF WARREN COUNTY, ET AL. Affirmed on appeal from D. C. S. D. Miss. Reported below: 386 F. Supp. 653.

No. 74–6427. WILSON *v.* MALONE ET AL. Affirmed on appeal from D. C. W. D. Ky.

No. 75–3. JAMAICA SAVINGS BANK *v.* LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 390 F. Supp. 1357.

No. 75–14. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* ATKINS, COMMISSIONER, TENNESSEE PUBLIC SERVICE COMMISSION, ET AL. Affirmed on appeal from D. C. M. D. Tenn. Reported below: 390 F. Supp. 576.

No. 74–1465. HAYES *v.* FLORIDA ET AL. Affirmed on appeal from D. C. S. D. Fla.

No. 75–5006. KEMP ET AL. *v.* TUCKER, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL. Affirmed on appeal from D. C. M. D. Pa. Reported below: 396 F. Supp. 737.

No. 75–28. INSTITUTE OF SCRAP IRON & STEEL, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal.

Appeals Dismissed

No. 74–1475. STEPHENS *v.* HOWLE. Appeal from Ct. App. Ga. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 133 Ga. App. 584, 211 S. E. 2d 637.

No. 74–1497. SCOTT ET AL. *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 74–1501. RICHARDS *v.* RICHARDS ET AL. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 328 A. 2d 383.

No. 74–1526. THOMPSON *v.* COUNTY BOARD OF SCHOOL TRUSTEES OF DUPAGE COUNTY, ILLINOIS, ET AL. Appeal from App. Ct. Ill., 2d Dist., dismissed for want

of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 22 Ill. App. 3d 45, 316 N. E. 2d 658.

No. 74–1612. EGER *v.* FLORIDA. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 511 F. 2d 132.

No. 74–1631. RUMMLER *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 44 Cal. App. 3d 638, 118 Cal. Rptr. 872.

No. 74–1636. MITCHELL *v.* MITCHELL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–6468. ANDERSON ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–6661. CISNEROS *v.* ORANGE COUNTY SUPERIOR COURT (JUVENILE COURT). Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 74–6719. ESCOFIL *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–6723. RICHARDSON *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 60 Ill. 2d 189, 328 N. E. 2d 260.

No. 74–1515. HOWELL *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF VIRGINIA ET AL. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this appeal. Reported below: 215 Va. 549, 211 S. E. 2d 265.

No. 74–1521. COVINGTON FABRICS CORP. *v.* SOUTH CAROLINA TAX COMMISSION. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. Reported below: 264 S. C. 59, 212 S. E. 2d 574.

No. 74–1541. WEINSTOCK ET AL. *v.* TOWN OF HULL ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: — Mass. —, 323 N. E. 2d 867.

No. 74–1570. WILLIAMS ET AL. *v.* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 460 Pa. 581, 333 A. 2d 924.

No. 74–1578. TOWN OF MANCHESTER *v.* GROVER. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 168 Conn. 84, 357 A. 2d 922.

No. 74–1582. WHITE *v.* HUGHES. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. Reported below: 257 Ark. 627, 519 S. W. 2d 70.

No. 74–1581. BALTIMORE & OHIO RAILROAD CO. ET AL. *v.* PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 461 Pa. 68, 334 A. 2d 636.

No. 74–1585. B. COLEMAN CORP. *v.* 47TH & STATE CURRENCY EXCHANGE, INC. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question.

No. 74–1609. ROBBINS MEN'S & BOYS' WEAR CORP. *v.* CITY OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of substantial federal question. Reported below: 46 App. Div. 2d 1016, 364 N. Y. S. 2d 809.

No. 74–1614. BALLARD *v.* BOARD OF TRUSTEES OF THE POLICE PENSION FUND OF THE CITY OF EVANSVILLE. Appeal from Sup. Ct. Ind. dismissed for want of substantial federal question. Reported below: 263 Ind. 79, 324 N. E. 2d 813.

No. 74–6398. CIALKOWSKI, AKA HALL *v.* NEBRASKA. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 193 Neb. 372, 227 N. W. 2d 406.

No. 74–6666. WADE ET UX. *v.* OREGON EX REL. JUVENILE DEPARTMENT OF MULTNOMAH COUNTY. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 19 Ore. App. 835, 528 P. 2d 1382.

No. 75–34. BEATON ET UX. *v.* JUDGES OF THE LAND COURT ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 326 N. E. 2d 302.

No. 75–115. DiDONATO *v.* FELDMAN ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 75–140. REITHOFFER'S, INC. *v.* BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA. Appeal from Cir. Ct. Va., Fairfax County, dismissed for want of substantial federal question.

No. 74–1565. SEACOAST TRANSPORTATION CO. *v.* PEREZ ET AL. Appeal from Sup. Ct. Fla. Motion of appellee Perez for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and appeal. Reported below: 308 So. 2d 537.

No. 74–1628. HUTTER *v.* KORZEN, TREASURER OF COOK COUNTY. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction, it appearing that there is no final judgment of the highest court of a State wherein a judgment could be had as required by 28 U. S. C. § 1257. Reported below: 27 Ill. App. 3d 634, 327 N. E. 2d 138.

No. 74–6441. LOWELL *v.* AMAN, AKA JOHANSON, ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

No. 75–26. LUCAS ET AL. *v.* ARKANSAS. Appeal from Sup. Ct. Ark. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 257 Ark. 726, 520 S. W. 2d 224.

No. 75–38. TOWNSHIP OF MOUNT LAUREL *v.* SOUTHERN BURLINGTON COUNTY N. A. A. C. P. ET AL. Appeal from Sup. Ct. N. J. Motion of appellees Clark et al. for leave to proceed *in forma pauperis* granted. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and appeal. Reported below: 67 N. J. 151, 336 A. 2d 713.

No. 75–5033. DAVIS *v.* MORRIS, SECRETARY, DEPARTMENT OF SOCIAL AND HEALTH SERVICE OF WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument.

Vacated and Remanded on Appeal

No. 74–1390. TOWN OF LOCKPORT, NEW YORK, ET AL. *v.* CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC., ET AL. Appeal from D. C. W. D. N. Y. Judgment vacated and case remanded for reconsideration in light of the provisions of new charter adopted by Niagara County in 1974. Reported below: 386 F. Supp. 1.

No. 75–81. POWELL, JUDGE, ET AL. *v.* LONG. Appeal from D. C. N. D. Ga. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded with directions to dismiss case as moot. MR. JUSTICE DOUGLAS would affirm the judgment below. Reported below: 388 F. Supp. 422.

No. 75–142. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* CINTRON. Appeal from D. C. P. R. Judgment vacated and case remanded for con-

sideration of question of mootness; if the cause is not moot, for reconsideration of determination of class action in light of *Weinberger* v. *Salfi*, 422 U. S. 749 (1975).

Certiorari Granted—Vacated and Remanded

No. 74–1372. TRAVISONO ET AL. *v.* SOUZA ET AL. C. A. 1st Cir. Motion of respondent Souza for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). Reported below: 512 F. 2d 1137.

No. 74–1413. COLEMAN, SECRETARY OF TRANSPORTATION, ET AL. *v.* CONSERVATION SOCIETY OF SOUTHERN VERMONT, INC., ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of 89 Stat. 424, 42 U. S. C. § 4332 (D) (1970 ed., Supp. V), and *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U. S. 289 (1975). Reported below: 508 F. 2d 927.

No. 74–1446. ROGERS ET AL. *v.* INTERNATIONAL PAPER CO. ET AL. C. A. 8th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975). Reported below: 510 F. 2d 1340.

No. 74–1470. LOUISIANA *v.* MORA. Sup. Ct. La. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to consider whether judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 307 So. 2d 317.

No. 75–46. ROUNDHOUSE CONSTRUCTION CORP. *v.* TELESCO MASONS SUPPLIES CO. ET AL. Sup. Ct. Conn. Certiorari granted, judgment vacated, and case remanded

to consider whether judgment is based upon federal or state constitutional grounds, or both. See *California* v. *Krivda*, 409 U. S. 33 (1972). Reported below: 168 Conn. 371, 362 A. 2d 778.

No. 75–83. UNIVERSITY OF CHICAGO & ARGONNE *v.* MCDANIEL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412 (1975), and *Cort* v. *Ash*, 422 U. S. 66 (1975). Reported below: 512 F. 2d 583.

Miscellaneous Orders

No. A–149 (74–323). IN RE BERRY. C. A. 10th Cir. Application for stay of confinement pending action on petition for writ of certiorari, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 521 F. 2d 179.

No. A–187. FEDERAL POWER COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. Application for stay of mandate of the United States Court of Appeals for the District of Columbia Circuit, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending timely filing of petition for writ of certiorari and final disposition thereon. MR. JUSTICE POWELL took no part in the consideration or decision of this application.

No. A–230. SMITH ET AL. *v.* UNITED STATES ET AL. Motion of County of San Diego to vacate stay heretofore granted by MR. JUSTICE DOUGLAS on September 11, 1975, granted. MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, dissents for the reasons stated in his opinion of September 11, 1975 [*post*, p. 1303], in which he granted a stay of the District Court's order.

No. A–218. BETTKER *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. Application for stay of order of the United States District Court for the Southern District of Ohio, dated December 16, 1974, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–49. IN RE DISBARMENT OF ISHLER. It having been reported to the Court that Loren Grant Ishler, of Toledo, Ohio, has resigned from the practice of law in the state courts of Ohio, and this Court by order of June 9, 1975 [421 U. S. 1008], having suspended the said Loren Grant Ishler from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent and that a response has been filed;

It is ordered that the said Loren Grant Ishler be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. D–50. IN RE DISBARMENT OF RUBIN. It is ordered that Franklin D. Rubin, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–51. IN RE DISBARMENT OF WHITAKER. It is ordered that Halbert E. Whitaker, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–52. IN RE DISBARMENT OF SHAFFER. It is ordered that Gerald L. Shaffer, of Fort Dodge, Iowa, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–53. IN RE DISBARMENT OF GOLDEN. It is ordered that Roy Aaron Golden, of Des Moines, Iowa, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–54. IN RE DISBARMENT OF WOLFF. It is ordered that Jerome B. Wolff, of Stevenson, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–55. IN RE DISBARMENT OF SILVERTON. It is ordered that Ronald Robert Silverton, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–56. IN RE DISBARMENT OF DEMOPOULOS. It is ordered that James George Demopoulos, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 73–1908. CORT ET AL. *v.* ASH, 422 U. S. 66. Motion of respondent to have Bethlehem Steel Corp. bear costs denied.

No. 67, Orig. IDAHO EX REL. ANDRUS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–1623. SLONE ET AL. *v.* DESKINS BRANCH COAL CO. ET AL. Appeal from D. C. E. D. Ky. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–93. TOWN OF SORRENTO MUNICIPAL DEMOCRATIC EXECUTIVE COMMITTEE ET AL. *v.* REINE ET AL. Appeal from D. C. M. D. La. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–1288. ALFRED DUNHILL OF LONDON, INC. *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. [Restored to calendar, 422 U. S. 1005.] Motion of respondents for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Petitioner also allotted 15 additional minutes for oral argument.

No. 73–6935. YOUAKIM ET AL. *v.* MILLER, DIRECTOR, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, ET AL. Appeal from D. C. N. D. Ill. [Probable jurisdiction noted, 420 U. S. 970.] Motion of Youth Law Center for leave to file a brief as *amicus curiae* denied.

No. 74–362. INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL., 422 U. S. 1. Motion of respondent Jones et al. to tax costs denied.

No. 74–450. ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL. *v.* ROBERTSON ET AL., 422 U. S. 255. Motion of respondents to retax costs granted.

No. 74–466. DUNLOP, SECRETARY OF LABOR *v.* BACHOWSKI ET AL., 421 U. S. 560. Motion of respondent Bachowski to retax costs denied.

No. 74–611. UNITED STATES ET AL. *v.* KASMIR ET AL. C. A. 5th Cir. [Certiorari granted, 420 U. S. 906.] Motion of respondents for additional time for oral argument denied. Motion of National Society of Public Accountants for leave to file a brief as *amicus curiae* granted.

No. 74–728. FRANKS ET AL. *v.* BOWMAN TRANSPORTATION CO., INC., ET AL. C. A. 5th Cir. [Certiorari granted, 420 U. S. 989.] Consideration of suggestion of mootness deferred to hearing of case on the merits. Motion of Local 862, United Automobile Workers, for leave to file brief as *amicus curiae* granted, and motion for leave to participate in oral argument as *amicus curiae* denied.

No. 74–742. FOREMOST-MCKESSON, INC. *v.* PROVIDENT SECURITIES CO. C. A. 9th Cir. [Certiorari granted, 420 U. S. 923.] Motion of Gulf & Western Industries, Inc., for leave to file a brief as *amicus curiae* granted.

No. 74–799. UNITED STATES *v.* FOSTER LUMBER CO., INC. C. A. 8th Cir. [Certiorari granted, 420 U. S. 1003.] Motion of Data Products Corp. for leave to participate in oral argument as *amicus curiae* denied.

No. 74–858. CAREY, GOVERNOR OF NEW YORK, ET AL. *v.* SUGAR ET AL.; and

No. 74–859. CURTIS CIRCULATION CO. ET AL. *v.* SUGAR ET AL. Appeals from D. C. S. D. N. Y. [Probable jurisdiction noted, 421 U. S. 908.] Motion of Legal Aid Society of New York City for leave to file a brief as *amicus curiae* granted.

No. 74–883. FEDERAL POWER COMMISSION *v.* MOSS ET AL. C. A. D. C. Cir. [Certiorari granted, 422 U. S. 1006.] Motion to dispense with printing appendix and to proceed on original record granted. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 74–884. UNITED STATES *v.* POWELL. C. A. 9th Cir. [Certiorari granted, 420 U. S. 971.] Motion of the Solicitor General to permit Frank H. Easterbrook, Esquire, to present oral argument *pro hac vice* granted.

No. 74–895. VIRGINIA STATE BOARD OF PHARMACY ET AL. *v.* VIRGINIA CITIZENS CONSUMER COUNCIL, INC., ET AL. Appeal from D. C. E. D. Va. [Probable jurisdiction noted, 420 U. S. 971.] Motion of American Association of Retired Persons et al. for leave to file a brief as *amici curiae* granted.

No. 74–1015. INTERCOUNTY CONSTRUCTION CORP. ET AL. *v.* WALTER, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL., 422 U. S. 1. Motion of respondent Jones to tax attorney's fees and costs denied.

No. 74–1023. KERR ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, 421 U. S. 987.] Consideration of respondents' suggestion of mootness deferred to hearing of case on the merits.

No. 74–1137. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* MILNE ET AL. Appeal from D. C. S. D. N. Y. [Probable jurisdiction noted, 422 U. S. 1054.] Motion to permit Gerald A. Norlander, Esquire, to present oral argument *pro hac vice* on behalf of appellees granted.

No. 74–1025. HINES ET AL. *v.* ANCHOR MOTOR FREIGHT, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 421 U. S. 928.] Motion to substitute Charles A. Hines as a party petitioner in place of Burtice A. Hines, deceased, granted. Motion of Prod, Inc., et al., for leave to file a brief as *amici curiae* granted. Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* denied.

No. 74–1033. DANN, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* JOHNSTON. C. C. P. A. [Certiorari granted, 421 U. S. 962.] Motion of Computer & Business Equipment Manufacturers Assn. for leave to file a brief as *amicus curiae* granted.

No. 74–1042. ERNST & ERNST *v.* HOCHFELDER ET AL. C. A. 7th Cir. [Certiorari granted, 421 U. S. 909.] Motion of the Solicitor General to permit the Securities and Exchange Commission to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Motion of American Institute of Certified Public Accountants for leave to file a brief as *amicus curiae* granted.

No. 74–1044. MASSACHUSETTS BOARD OF RETIREMENT ET AL. *v.* MURGIA. Appeal from D. C. Mass. [Probable jurisdiction noted, 421 U. S. 974.] Motion of American Medical Assn. for leave to file a brief as *amicus curiae* granted.

No. 74–1245. LIBERTY MUTUAL INSURANCE CO. *v.* WETZEL ET AL. C. A. 3d Cir. [Certiorari granted, 421 U. S. 987.] Motion of Alaska Airlines, Inc., et al., for leave to file a brief as *amici curiae* granted. Motion of the Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* denied.

No. 74–1055. STONE, WARDEN *v.* POWELL. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1055.] Motion for appointment of counsel granted, and Robert W. Peterson, Esquire, of Santa Clara, Cal., is appointed to serve as counsel for respondent in this case.

No. 74–1222. WOLFF, WARDEN *v.* RICE. C. A. 8th Cir. [Certiorari granted, 422 U. S. 1055.] Motion of Americans for Effective Law Enforcement, Inc., et al., for leave to file a brief as *amici curiae* granted.

No. 74–1269. KELLEY *v.* JOHNSON. C. A. 2d Cir. [Certiorari granted, *sub nom. Barry* v. *Dwen,* 421 U. S. 987.] Motion of International Brotherhood of Police Officers for leave to file a brief as *amicus curiae* granted.

No. 74–1274. ABBOTT LABORATORIES ET AL. *v.* PORTLAND RETAIL DRUGGISTS ASSN., INC. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1040.] Motion of American Hospital Assn. for leave to file a brief as *amicus curiae* granted.

No. 74–5435. IMBLER *v.* PACHTMAN. C. A. 9th Cir. [Certiorari granted, 420 U. S. 945.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted and 15 additional minutes allotted for that purpose. Motion of the Attorney General of California to participate in oral argument as *amicus curiae* denied.

No. 74–6293. GOLDBERG *v.* UNITED STATES. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1006.] Motion of petitioner for appointment of counsel granted and Donald C. Smaltz, Esquire, of Los Angeles, Cal., is appointed to serve as counsel for petitioner. Motion of California Attorneys for Criminal Justice et al. for leave to participate in oral argument as *amici curiae* denied.

No. 74–6442. THOMAS *v.* HOGAN, WARDEN;

No. 74–6713. LAWRENCE *v.* HENDERSON, WARDEN, ET AL.;

No. 75–5029. HARDING *v.* WARDEN, MARYLAND PENITENTIARY;

No. 75–5228. GLASS *v.* GAGNON, WARDEN;

No. 75–5229. HARGRAVES *v.* GAGNON, WARDEN;

No. 75–5230. WILLIAMS *v.* GAGNON, WARDEN;

No. 75–5231. CRAIG *v.* GAGNON, WARDEN;

No. 75–5232. GONZALES *v.* GAGNON, WARDEN; and

No. 75–5302. ORBIZ *v.* UNITED STATES. Motions for leave to file petitions for writs of habeas corpus denied.

No. 74–6335. ARNOLD *v.* LAUF, RECORDS CLERK, MISSOURI STATE PRISON;

No. 74–6524. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA;

No. 74–6577. THERIAULT *v.* PITTMAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL.;

No. 74–6588. COZZETTI *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL.;

No. 74–6684. STURGEON *v.* MCMANUS, JUDGE; and

No. 75–5102. HENRY *v.* GLADDEN, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 74–1455. TYREE *v.* COMMISSIONER OF PATENTS ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 74–6701. COOK *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Probable Jurisdiction Noted

No. 74–1488. SECRETARY OF THE INTERIOR *v.* NEW MEXICO ET AL. Appeal from D. C. N. M. Probable jurisdiction noted. Reported below: 406 F. Supp. 1237.

No. 74–1481. AMERICAN MOTORISTS INSURANCE CO. *v.* STARNES. Appeal from Ct. Civ. App. Tex., 10th Sup. Jud. Dist. Probable jurisdiction noted. Reported below: 515 S. W. 2d 354.

No. 74–1607. HUGHES, SECRETARY OF TRANSPORTATION OF MARYLAND, ET AL. *v.* ALEXANDRIA SCRAP CORP. Appeal from D. C. Md. Probable jurisdiction noted. Reported below: 391 F. Supp. 46.

No. 74–1151. PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL.; and

No. 74–1419. DANFORTH, ATTORNEY GENERAL OF MISSOURI *v.* PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. Appeals from D. C. E. D. Mo. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 392 F. Supp. 1362.

No. 74–1656. MOE, SHERIFF, ET AL. *v.* CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION ET AL.; and

No. 75–50. CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION ET AL. *v.* MOE, SHERIFF, ET AL. Appeals from D. C. Mont. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 392 F. Supp. 1297 and 1325.

No. 75–88. MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* LUCAS ET AL. Appeal from D. C. R. I. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted and case set for oral argument with No. 74–6212, *Norton* v. *Mathews* [probable jurisdiction noted, *sub nom. Norton* v. *Weinberger*, 422 U. S. 1054]. Reported below: 390 F. Supp. 1310.

No. 75–436. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from C. A. D. C. Cir.; and

No. 75–437. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from D. C. D. C. Probable jurisdiction noted. Cases consolidated and a total of four hours allotted for oral argument to be evenly divided between appellants and appellees. Motion of Senators Hugh Scott and Edward M. Kennedy for leave to permit oral argument on their behalf as *amici curiae* denied without prejudice to their seeking part of the two hours allotted appellees. Reported below: No. 75–436, 171 U. S. App. D. C. 172, 519 F. 2d 821; No. 75–437, 401 F. Supp. 1235.

Certiorari Granted

No. 74–1254. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* MOBIL OIL CORP., MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS. C. A. 5th Cir. Certiorari granted. Reported below: 504 F. 2d 272.

No. 74–1318. DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 507 F. 2d 611.

No. 74–1452. HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 511 F. 2d 678.

No. 74–1471. TSC INDUSTRIES, INC., ET AL. *v.* NORTHWAY, INC. C. A. 7th Cir. Certiorari granted. Reported below: 512 F. 2d 324.

No. 74–1492. WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 168 U. S. App. D. C. 42, 512 F. 2d 956.

No. 74–1520. ELROD, SHERIFF, ET AL. *v.* BURNS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 509 F. 2d 1133.

No. 74–1599. CHANDLER *v.* ROUDEBUSH, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 515 F. 2d 251.

No. 74–1606. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ET AL. *v.* HORTONVILLE EDUCATION ASSN. ET AL. Sup. Ct. Wis. Certiorari granted. Reported below: 66 Wis. 2d 469, 225 N. W. 2d 658.

No. 75–95. TENNESSEE ET AL. *v.* DUNLAP. C. A. 6th Cir. Certiorari granted. Reported below: 514 F. 2d 130.

No. 75–122. CANTOR, DBA SELDEN DRUGS CO. *v.* DETROIT EDISON CO. C. A. 6th Cir. Certiorari granted. Reported below: 513 F. 2d 630.

No. 75–246. UNITED STATES *v.* HOPKINS, SPECIAL ADMINISTRATOR. Ct. Cl. Certiorari granted. Reported below: 206 Ct. Cl. 303, 513 F. 2d 1360.

No. 74–1487. UNITED STATES *v.* MACCOLLOM. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this motion and petition. Reported below: 511 F. 2d 1116.

No. 74–1529. HENDERSON, CORRECTIONAL SUPERINTENDENT *v.* MORGAN. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 516 F. 2d 897.

No. 74–1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 8th Cir. Certiorari granted limited to Question 1 presented by the

petition, which reads as follows: "Does the Section of the Clean Air Act (Section 307 (b)(1)), which provides for judicial review by the Court of Appeals of EPA approval of sulfur dioxide emission regulations in the Missouri implementation plan, prevent the Court of Appeals from considering technological and economic factors applicable to petitioner and such regulations, when the petition for judicial review was filed more than 30 days after EPA approval of such plan, when such technological and economic factors arose more than 30 days after EPA approval and when those factors make it impossible for petitioner to comply with those regulations and [it would be] manifestly against the public interest for it to attempt to do so?" Reported below: 515 F. 2d 206.

No. 74–1560. UNITED STATES *v.* MARTINEZ-FUERTE ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Motion to strike portions of petition denied. Reported below: 514 F. 2d 308.

No. 74–1589. GENERAL ELECTRIC CO. *v.* GILBERT ET AL.; and

No. 74–1590. GILBERT ET AL. *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 519 F. 2d 661.

No. 74–1646. ANDRESEN *v.* MARYLAND. Ct. Sp. App. Md. Certiorari granted limited to Questions I and II presented by the petition which read as follows:

"I. May an attorney at law, who is a sole practitioner, invoke his privilege against self-incrimination under Amendment V to the Constitution of the United States, to prevent the introduction of his personal handwritten notes and memoranda, books and records, which were seized from his desk and files in his personal office, under

a search warrant held to be otherwise reasonable, into evidence against him at his criminal trial?

"II. Was the search of petitioner's offices violative of Amendment IV to the Constitution of the United States?" Reported below: 24 Md. App. 128, 331 A. 2d 78.

No. 74–6521. ALDINGER *v.* HOWARD, TREASURER OF SPOKANE COUNTY, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 513 F. 2d 1257.

No. 75–5014. DOYLE *v.* OHIO; and

No. 75–5015. WOOD *v.* OHIO. Ct. App. Ohio, Tuscarawas County. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petitions, which read as follows:

"1. Whether an accused who asserts his right of silence and his right to counsel following his arrest properly subjects himself:

"(a) to questions as to why he did not protest his innocence at the point of arrest, at the Preliminary Hearing, or at some time earlier than at the trial;

"(b) to the prosecutor's argument to the jury that an unfavorable inference could be drawn against the accused as a consequence of his having exercised these constitutional rights;

"(c) to questions as to why he did not consent to the search of the car (thus necessitating obtaining a search warrant) and to an argument on this point.

"2. Whether a defense witness who was arrested and charged along with the defendant on trial can be properly asked why he did not protest his innocence earlier than at the trial, and can the prosecutor argue this point to the jury?"

Cases consolidated and a total of one hour allotted for oral argument.

Certiorari Denied. (See also Nos. 74–1475, 74–1497, 74–1501, 74–1526, 74–1565, 74–1612, 74–1631, 74–1636, 74–6468, 74–6661, 74–6719, 74–6723, and 75–38, *supra.*)

No. 74–1220. WOOLDRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 1230.

No. 74–1250. BOARD OF EDUCATION OF THE OKLAHOMA CITY PUBLIC SCHOOLS ET AL. *v.* DOWELL ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–1252. CROCKETT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 759.

No. 74–1257. NOEL ET AL. *v.* CHAPMAN, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 508 F. 2d 1023.

No. 74–1261. BARRASSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–1262. CHIARITO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1098.

No. 74–1266. PARK *v.* HUFF. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 849.

No. 74–1277. GRAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1013.

No. 74–1294. LOUISVILLE & NASHVILLE RAILROAD CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 610.

No. 74–1283. C. N. S. ENTERPRISES, INC., ET AL. *v.* G. & G. ENTERPRISES, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 508 F. 2d 1354.

No. 74–1284. EDMUNDS *v.* CHANG, JUDGE. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 39.

No. 74–1285. MULLER *v.* UNITED STATES STEEL CORP. C. A. 10th Cir. Certiorari denied. Reported below: 509 F. 2d 923.

No. 74–1292. PARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 975.

No. 74–1298. MICHAEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1399.

No. 74–1301. LOUISIANA *v.* BIRABENT. Sup. Ct. La. Certiorari denied. Reported below: 305 So. 2d 448.

No. 74–1313. SNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 21.

No. 74–1322. BODZIN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 509 F. 2d 679.

No. 74–1323. DOUGLAS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 96, 510 F. 2d 364.

No. 74–1332. BRITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 1052.

No. 74–1336. MORRILL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 74–1337. RAHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 511 F. 2d 290.

No. 74–1341. MERRITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1279.

No. 74–1343. GOMEZ-ROJAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1213.

No. 74–1351. DEL TORO *v.* UNITED STATES; and
No. 74–1353. KAUFMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 656.

No. 74–1355. SCOTTY'S HOME BUILDERS ET AL. *v.* CUNNINGHAM ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 307 So. 2d 182.

No. 74–1357. WILKERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 345.

No. 74–1361. MAGANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 1169.

No. 74–1363. OAK CLIFF-GOLMAN BAKING CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below; 505 F. 2d 1302.

No. 74–1369. BURRELL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 332 A. 2d 344.

No. 74–1371. MCCORKLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 482.

No. 74–1373. REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 74–1346. MacKenzie et al. *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 74–1376. Cities Service Co. *v.* United States; and

No. 75–9. United States *v.* Cities Service Co. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 1281.

No. 74–1378. General Dynamics Corp. *v.* Equal Employment Opportunity Commission; and

No. 74–1444. International Association of Machinists & Aerospace Workers, AFL–CIO *v.* Equal Employment Opportunity Commission. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 382.

No. 74–1381. Wabash Transformer Corp. *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 647.

No. 74–1383. National Nutritional Foods Assn. et al. *v.* Mathews, Secretary of Health, Education, and Welfare, et al. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 688.

No. 74–1385. Kirkland, Administratrix *v.* Missouri-Kansas-Texas Railroad Co. C. A. 10th Cir. Certiorari denied.

No. 74–1386. Klein *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 74–1387. Lowe et al., Co-executors *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. Reported below: 510 F. 2d 479.

No. 74–1391. Sanchez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 388.

No. 74–1395. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 797.

No. 74–1397. DECAVALCANTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 626.

No. 74–1398. LAMBERT *v.* PROVIDENCE JOURNAL CO. C. A. 1st Cir. Certiorari denied. Reported below: 508 F. 2d 656.

No. 74–1399. KENTUCKY CENTRAL LIFE INSURANCE CO. *v.* MYERS. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 1054.

No. 74–1400. SUMMERLIN ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 74–1401. BADARACCO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 74–1402. HAM *v.* CITY OF TULSA. C. A. 10th Cir. Certiorari denied.

No. 74–1403. WEBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1397.

No. 74–1405. GREENSPAHN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 74–1406. ALRED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 330.

No. 74–1411. WILLIAMS ET AL. *v.* MUMFORD, LIBRARIAN OF CONGRESS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 125, 511 F. 2d 363.

No. 74–1408. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 976.

No. 74–1410. ROBERTS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 F. 2d 1150.

No. 74–1412. PRO ARTS, INC. *v.* BELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 451.

No. 74–1415. STERN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1364.

No. 74–1416. DELTA COUNTY LEVEE IMPROVEMENT DISTRICT NO. 2 ET AL. *v.* LEONARD ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 516 S. W. 2d 911.

No. 74–1417. LALLY *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 167 Conn. 601, 356 A. 2d 897.

No. 74–1421. CASHEN ET UX. *v.* SPANN ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 66 N. J. 541, 334 A. 2d 8.

No. 74–1423. CUSUMANO ET AL. *v.* RATCHFORD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 507 F. 2d 980.

No. 74–1424. ASHDOWN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 793.

No. 74–1431. MILLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 74–1433. TELEVISION RECEPTION CORP. *v.* COMMONWEALTH CABLE CO. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–1436. WHITE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1217.

No. 74–1437. ROELOFS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 87.

No. 74–1438. ASSOCIATED ELECTRIC COOPERATIVE, INC. *v.* SECRETARY OF THE INTERIOR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 165 U. S. App. D. C. 344, 507 F. 2d 1167.

No. 74–1441. CONTRA COSTA COUNTY WATER DISTRICT *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 1061, 513 F. 2d 638.

No. 74–1442. PETERSON *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 45.

No. 74–1443. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* DUNLOP, SECRETARY OF LABOR, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 506 F. 2d 385.

No. 74–1447. RAINES *v.* AMERICAN MAIL LINE, LTD. C. A. 9th Cir. Certiorari denied.

No. 74–1448. HARRIS ET AL. *v.* PRESBYTERY OF SOUTHEAST IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 226 N. W. 2d 232.

No. 74–1449. HARVEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 635.

No. 74–1450. GOELTZ *v.* UNITED STATES; and

No. 74–6571. BRAY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 513 F. 2d 193.

No. 74–1453. NEWSPAPER & PERIODICAL DRIVERS & HELPERS UNION, LOCAL 921, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 99.

No. 74–1454. AKERS *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 499 F. 2d 44.

No. 74–1456. IANNIELLO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 137, 325 N. E. 2d 146.

No. 74–1457. SUMITOMO FORESTRY CO., LTD., OF JAPAN *v.* THURSTON COUNTY, WASHINGTON. C. A. 9th Cir. Certiorari denied. Reported below: 504 F. 2d 604.

No. 74–1462. REX CHAINBELT, INC. *v.* HARCO PRODUCTS, INC., DBA DFC Co. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 993.

No. 74–1463. ROSS *v.* UNITED STATES ATTORNEY'S OFFICE FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 511 F. 2d 524.

No. 74–1464. EDGE, ADMINISTRATOR *v.* UNION MEDICAL CENTER, INC. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 342, 487 F. 2d 1213.

No. 74–1466. RAHMING *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 299 So. 2d 169.

No. 74–1472. PASSARELLA *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 23 N. C. App. 522, 209 S. E. 2d 406.

No. 74–1473. NAZARENO ET AL. *v.* LEVI, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. Reported below: 168 U. S. App. D. C. 22, 512 F. 2d 936.

No. 74–1474. DICKSON *v.* DICKSON. Ct. App. Wash. Certiorari denied. Reported below: 12 Wash. App. 2d 183, 529 P. 2d 476.

No. 74–1479. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 1400.

No. 74–1480. GERRY *v.* UNITED STATES; and
No. 74–1531. PERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 130.

No. 74–1483. UNITED STATES STEEL CORP. *v.* RODGERS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 508 F. 2d 152.

No. 74–1484. QUINTANA *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 87 N. M. 414, 534 P. 2d 1126.

No. 74–1489. BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. *v.* DAY & ZIMMERMANN, INC., ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 519 S. W. 2d 106.

No. 74–1491. TRAMUNTI *v.* UNITED STATES;
No. 74–6295. ROBINSON *v.* UNITED STATES;
No. 74–6296. WARE *v.* UNITED STATES;
No. 74–6301. SPRINGER *v.* UNITED STATES; and
No. 75–42. DINAPOLI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 1087.

No. 74–1494. CURRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 512 F. 2d 1299.

No. 74–1495. SHEFNER *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied.

No. 74–1496. LOCAL 203, GRAPHIC ARTS INTERNATIONAL UNION, AFL–CIO *v.* COLONIAL PRESS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 850.

No. 74–1498. WILLIAMS *v.* STERRETT, JUDGE. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 74–1500. MCCORD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 509 F. 2d 891.

No. 74–1502. AVNET, INC. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 70.

No. 74–1503. KECKEISEN *v.* INDEPENDENT SCHOOL DISTRICT 612, GLENWOOD, MINNESOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 509 F. 2d 1062.

No. 74–1504. BAGLEY PRODUCE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 510 F. 2d 975.

No. 74–1506. FISHER ET AL. *v.* CITY OF SYRACUSE ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 216, 361 N. Y. S. 2d 773.

No. 74–1525. ALUMINUM COMPANY OF AMERICA ET AL. *v.* WOODS EXPLORATION & PRODUCING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 784.

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No. 74–1507. MASCUILLI *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1394.

No. 74–1508. ELOT H. RAFFETY FARMS, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 2d 1234.

No. 74–1512. VITTITOW *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 74–1513. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1405.

No. 74–1514. HESSE *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–1519. ST. PETERSBURG BANK & TRUST CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1402.

No. 74–1523. DODSON ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 43 Ohio App. 2d 31, 332 N. E. 2d 371.

No. 74–1524. FOOD DRIVERS, HELPERS & WAREHOUSEMEN EMPLOYEES OF PHILADELPHIA AND VICINITY, AND CAMDEN AND VICINITY, NEW JERSEY, LOCAL 500, ET AL. *v.* FOX TRANSPORT SYSTEM ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–1527. GOLDINGER *v.* BORON OIL CO. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–1528. BOTANY INDUSTRIES, INC., ET AL. *v.* FIRST NATIONAL BANK OF BOSTON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1392.

No. 74–1530. GOLDBERG ET AL. *v.* ARROW ELECTRONICS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 1258.

No. 74–1532. COCKE *v.* CANTOR ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–1533. ST. PAUL FIRE & MARINE INSURANCE CO. *v.* COMMUNITY OIL CO., INC., ET AL. Cir. Ct. W. Va., Jefferson County. Certiorari denied.

No. 74–1534. WILLIAMS *v.* BOARD OF EDUCATION OF UNION TOWNSHIP, UNION COUNTY. Super. Ct. N. J. Certiorari denied.

No. 74–1535. ALBAUGH *v.* MANDEL, GOVERNOR OF MARYLAND, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 74–1536. BRUNO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–1537. M. W. ZACK METAL CO. *v.* INTERNATIONAL NAVIGATION CORPORATION OF MONROVIA. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 451.

No. 74–1545. BURGE *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 24 Ill. App. 3d 258, 320 N. E. 2d 113.

No. 74–1539. WATKINS *v.* WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 166, 511 F. 2d 404.

No. 74–1543. DAWSON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 278, 326 N. E. 2d 755.

No. 74–1538. WESTER *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 528 P. 2d 1179.

No. 74–1546. FINKLE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 66 N. J. 139, 329 A. 2d 65.

No. 74–1547. NORRIS *v.* NORRIS. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 74–1548. OLD TOWN YACHT BASIN, INC. *v.* CITY OF ALEXANDRIA. Sup. Ct. Va. Certiorari denied.

No. 74–1550. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 2d 1142.

No. 74–1551. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 757.

No. 74–1556. VINCENT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1404.

No. 74–1557. HOGAN ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 170.

No. 74–1558. BECK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 997.

No. 74–1559. LINN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 513 F. 2d 925.

No. 74–1561. DECOTO AIRCRAFT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 758.

No. 74–1562. MERETSKY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–1564. BERNABEI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 74–1567. BRYAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 644.

No. 74–1571. SARULLO ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 1174.

No. 74–1572. BUITRON ET AL. *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 519 S. W. 2d 467.

No. 74–1575. RICHARDSON INDEPENDENT SCHOOL DISTRICT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 896.

No. 74–1576. CUENI *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 303 So. 2d 411.

No. 74–1577. BIAS ET AL. *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 74–1579. STASZCUK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 53.

No. 74–1580. LOBO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 883.

No. 74–1583. NAPPER ET UX. *v.* ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 634 and 507 F. 2d 723.

No. 74–1584. HAMPTON, EXECUTRIX *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 422, 513 F. 2d 1234.

No. 74–1587. GONZALEZ ET AL. *v.* COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY. C. A. 1st Cir. Certiorari denied. Reported below: 512 F. 2d 1307.

No. 74–1588. FORD MOTOR CREDIT CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 476 F. 2d 960 and 509 F. 2d 1324.

No. 74–1591. WILLIAMS *v.* NICHOLS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 74–1592. TURCO *v.* MONROE COUNTY BAR ASSN. OF NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 490, 363 N. Y. S. 2d 349.

No. 74–1593. CHEVRON INTERNATIONAL OIL CO. *v.* FAIRMONT SHIPPING CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1252.

No. 74–1594. DIAPULSE CORPORATION OF AMERICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 2d 1097.

No. 74–1595. BROSTEN *v.* PARK CITY, ILLINOIS. App. Ct. Ill., 2d Jud. Dist. Certiorari denied. Reported below: 24 Ill. App. 3d 442, 321 N. E. 2d 15.

No. 74–1596. COLD CREEK LAND & CATTLE CO. *v.* JONES ET UX. C. A. 9th Cir. Certiorari denied.

No. 74–1597. MASSEY ET AL. *v.* GULF OIL CORP. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 92.

No. 74–1598. WEARY ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 2d 435.

No. 74–1603. GOLD *v.* HANDEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 624.

No. 74–1604. ILLINOIS FEDERATION OF TEACHERS, AFT, AFL–CIO, ET AL. *v.* LINDBERG, COMPTROLLER OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 266, 326 N. E. 2d 749.

No. 74–1610. OLSEN *v.* GOODMAN. Sup. Ct. Fla. Certiorari denied. Reported below: 305 So. 2d 753.

No. 74–1611. UNITED STATES TRUST COMPANY OF NEW YORK *v.* FAS INTERNATIONAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1164.

No. 74–1615. KING RADIO CORP., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 2d 1154.

No. 74–1616. STARNES *v.* PENROD DRILLING CO.; and No. 74–1617. JOHNSON *v.* PENROD DRILLING CO. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 234.

No. 74–1626. BURTON *v.* CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5 ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 850.

No. 74–1620. SULLIVAN *v.* DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 766, 329 N. E. 2d 670.

No. 74–1621. LOCKETT *v.* COLEMAN ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 293 Ala. 613, 308 So. 2d 689.

No. 74–1627. BROWN, RECEIVER *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 333.

No. 74–1613. PACE, SHERIFF *v.* SQUIRE. C. A. 4th Cir. Certiorari denied. Reported below: 516 F. 2d 240.

No. 74–1618. COOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 637.

No. 74–1630. TITAN GROUP, INC. *v.* FAGGEN. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 234.

No. 74–1632. MCCOLE ET AL. *v.* BIDSTRUP ET AL. Ct. App. Wash. Certiorari denied.

No. 74–1634. WILEY *v.* PENNSYLVANIA Super. Ct. Pa. Certiorari denied. Reported below: 229 Pa. Super. 760, 325 A. 2d 629.

No. 74–1635. HELLER *v.* DISTRICT OF COLUMBIA COURT OF APPEALS COMMITTEE ON ADMISSIONS. Ct. App. D. C. Certiorari denied. Reported below: 333 A. 2d 401.

No. 74–1637. GRIFFITH, ADMINISTRATRIX *v.* CANAL BARGE CO., INC.; and

No. 74–1641. CANAL BARGE CO., INC. *v.* GRIFFITH. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 911.

No. 74–1639. MORTGAGE SERVICES, INC. *v.* YARNELL. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1163.

No. 74–1640. BETHLEHEM STEEL CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 122, 511 F. 2d 529.

No. 74–1642. ANONYMOUS J. ET AL. *v.* BAR ASSOCIATION OF ERIE COUNTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 435.

No. 74–1643. APPLEYARD ET AL. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 513 F. 2d 575.

No. 74–1649. SOSTRE *v.* FESTA, JAIL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 1313.

No. 74–1651. CLARK ET AL. *v.* WATCHIE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 2d 994.

No. 74–1652. WOODCOCK *v.* AMARAL. C. A. 1st Cir. Certiorari denied. Reported below: 511 F. 2d 985.

No. 74–1653. SUMMA CORP. ET AL. *v.* TRANS WORLD AIRLINES, INC. Sup. Ct. Del. Certiorari denied. Reported below: 336 A. 2d 572.

No. 74–1654. ALABAMA CUSTOM TAPE, INC., ET AL. *v.* FAME PUBLISHING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 667.

No. 74–1655. MAPES ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 382.

No. 74–6158. GARDNER ET AL. *v.* LUCKEY, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 500 F. 2d 712.

No. 74–6228. PHILLIPS, AKA DAVIS *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 758.

No. 74–6246. WATSON *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–6254. PIERCE *v.* CANNON, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 508 F. 2d 197.

No. 74–6294. JONES *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 382.

No. 74–6289. EGGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 F. 2d 745.

No. 74–6300. CARUTH *v.* POWER ET AL., JUDGES. C. A. 7th Cir. Certiorari denied. Reported below: 515 F. 2d 511.

No. 74–6304. RUNGE *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 74–6306. GOLDSTEIN *v.* UNITED STATES;
No. 74–6352. FLORES *v.* UNITED STATES; and
No. 74–6354. VAVARIGOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 1191.

No. 74–6309. NIXON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 504 F. 2d 758.

No. 74–6319. MAZE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 973.

No. 74–6320. CAPUCHINO *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 440.

No. 74–6323. JORDAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 508 F. 2d 750.

No. 74–6324. ZSIDO *v.* UNITED STATES;
No. 74–6348. COOK *v.* UNITED STATES; and
No. 74–6431. BARCLIFT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 1073.

No. 74–6330. HATCH *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 305 So. 2d 497.

No. 74–6334. PRITCHARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 74–6336. WARNER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 1061, 506 F. 2d 1406.

No. 74–6337. EVANS *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 19 Ore. App. 345, 527 P. 2d 731.

No. 74–6342. SULLIVAN *v.* UNITED STATES BOARD OF PAROLE. C. A. 10th Cir. Certiorari denied.

No. 74–6370. ETHERIDGE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 1249.

No. 74–6375. SENK *v.* BRIERLEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6376. MANN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1394.

No. 74–6378. GWYNN *v.* DIRECTOR, PATUXENT INSTITUTION, ET AL. Ct. App. Md. Certiorari denied.

No. 74–6380. TULLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 74–6381. DARAS *v.* WALKER. C. A. 9th Cir. Certiorari denied.

No. 74–6382. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 2d 198.

No. 74–6387. WILDER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 22 Ariz. App. 541, 529 P. 2d 253.

No. 74–6417. FIELDS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 59 Ill. 2d 516, 322 N. E. 2d 33.

No. 74–6389. WOOD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1399.

No. 74–6391. MELENDREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6394. ROWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 2d 766.

No. 74–6402. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 664.

No. 74–6403. STRATTON *v.* SIGLER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 632.

No. 74–6407. GRUMMEL *v.* UNITED STATES;
No. 74–6628. RIFAI *v.* UNITED STATES; and
No. 75–5146. BRESOLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6418. WATSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 23 Ill. App. 3d 956, 320 N. E. 2d 360.

No. 74–6420. WETZEL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 514 F. 2d 175.

No. 74–6422. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1404.

No. 74–6423. ROBBINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 510 F. 2d 967.

No. 74–6424. DRUMMOND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1049.

No. 74–6428. COYLE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 460 Pa. 234, 332 A. 2d 442.

No. 74–6425. HASKINS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 624.

No. 74–6429. ARCHER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 F. 2d 1398.

No. 74–6430. VILLANUEVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 74–6435. BROWN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–6437. SWALLOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 511 F. 2d 514.

No. 74–6440. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 595.

No. 74–6443. TRIPKOVICH *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 22 Ill. App. 3d 719, 318 N. E. 2d 60.

No. 74–6445. GASKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 74–6446. SIMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 147.

No. 74–6447. WINFREE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 1400.

No. 74–6454. KERR *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 166 U. S. App. D. C. 205, 509 F. 2d 538.

No. 74–6472. HERMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 601.

No. 74–6455. FLORES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74–6458. SHADD *v.* HOGAN, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6461. STRICKLAND *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 332 A. 2d 746.

No. 74–6465. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1020.

No. 74–6466. TOWNSEND *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 167 Conn. 539, 356 A. 2d 125.

No. 74–6467. TOWNS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 1057.

No. 74–6474. SOLVEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 2d 1059.

No. 74–6476. GARRETT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 133 Ga. App. 564, 211 S. E. 2d 584.

No. 74–6477. POINDEXTER ET AL. *v.* WOODSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 510 F. 2d 464.

No. 74–6479. HOLLAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 74–6493. WARD *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 74–6483. PIPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6486. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 2d 758.

No. 74–6489. GUAJARDO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 1093.

No. 74–6490. GORDON *v.* COMMISSIONER, EMPLOYMENT SECURITY DEPARTMENT OF WASHINGTON. Ct. App. Wash. Certiorari denied.

No. 74–6494. JAMES *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6495. MAGEE *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 74–6496. BAZUA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6497. SHEA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 82.

No. 74–6501. LIRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 68.

No. 74–6504. WOODS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6506. CRAVEN *v.* SUPERINTENDENT, CALIFORNIA CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 74–6505. SPIRN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 1391.

No. 74–6507. DAVIDSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 574.

No. 74–6508. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1405.

No. 74–6509. RUSSELL *v.* COOPER, WARDEN. Sup. Ct. S. C. Certiorari denied. Reported below: 263 S. C. 526, 211 S. E. 2d 655.

No. 74–6510. RAY *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied.

No. 74–6511. JAMES *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 307 So. 2d 549.

No. 74–6512. FLEMING *v.* R. I. G. H. T. CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–6513. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6514. HUNT *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied.

No. 74–6515. KENNEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1398.

No. 74–6516. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 F. 2d 1399.

No. 74–6520. TURNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 497 F. 2d 406.

No. 74–6519. FITZPATRICK *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 739, 362 N. Y. S. 2d 438.

No. 74–6522. RICH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6523. WYNN *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 383.

No. 74–6525. JARBOE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 33.

No. 74–6527. MORRIS *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 57 Mich. App. 573, 226 N. W. 2d 565.

No. 74–6528. JOHNSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 58 Mich. App. 165, 227 N. W. 2d 272.

No. 74–6529. WALKER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 511 F. 2d 1024.

No. 74–6530. PARKER *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 393 Mich. 531, 227 N. W. 2d 775.

No. 74–6531. MILLER ET AL. *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 520 S. W. 2d 729.

No. 74–6533. MUNCASTER *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 1279.

No. 74–6535. KIPPERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6526. STRATTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1405.

No. 74–6534. TAYLOR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 74–6536. PENA-OZUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 511 F. 2d 1106.

No. 74–6537. VAN HORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 666.

No. 74–6538. MILLER *v.* FORD, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–6539. O'CLAIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 74–6540. MANZO *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 74–6541. SHADD *v.* FIREMAN'S FUND INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1393.

No. 74–6542. SHADD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1396.

No. 74–6543. BORUSKI *v.* STEWART ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–6544. GUBINS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 74–6545. PATRICK *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App ——, 315 N. E. 2d 382.

No. 74–6549. LOZANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 1.

No. 74–6548. RATTEREE, AKA LESTEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 74–6550. BERMAN *v.* UNITED STATES; and
No. 74–6662. QUATTROCHI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6552. GREEN *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 74–6554. JACKSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 329 A. 2d 782.

No. 74–6555. HAFNER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 168 Conn. 230, 362 A. 2d 925.

No. 74–6556. BREWTON *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 19 Ore. App. 899, 529 P. 2d 967.

No. 74–6558. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 635.

No. 74–6559. SUMMERS ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 510 F. 2d 123.

No. 74–6562. ROBERTS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 298 So. 2d 593.

No. 74–6564. BURKE *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–6566. JORDAN *v.* JOHNSON, CORRECTIONS DIRECTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 631.

No. 74–6565. JORDAN *v.* DILLEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 74–6567. STEJSKAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6569. HAMMOND *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 74–6570. FLORES-ARIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6572. QUIÑONES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 516 F. 2d 1309.

No. 74–6573. MARTZ *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 74–6574. LEACH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 505.

No. 74–6575. PETTIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 74–6576. DUREN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 74–6578. TAYLOR *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 483, 323 N. E. 2d 685.

No. 74–6580. SWIST *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–6581. BISSONETTE *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 307 So. 2d 222.

No. 74–6583. MATHIS *v.* UNITED STATES; and
No. 74–6651. LYNCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 518.

No. 74–6584. LIPSMAN *v.* GIARDINO ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–6585. BIRKLA *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 263 Ind. 37, 323 N. E. 2d 645.

No. 74–6586. BRIDGES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 635.

No. 74–6587. POWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 1249.

No. 74–6589. SHAW *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 383.

No. 74–6590. DUMAS *v.* PATTERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6591. JOST *v.* GRIGGS, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–6594. PONCE-MARTINEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6595. POSTEL *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 679.

No. 74–6597. VILLEGAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 491.

No. 74–6598. BROWN *v.* CASSCLES, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6599. GLENN *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 74–6606. WELTER *v.* GRAY. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 635.

No. 74–6600. THERIAULT *v.* PITTMAN, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–6601. WILLIAMS *v.* PATTERSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 505.

No. 74–6602. POLANCO *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 507 F. 2d 81.

No. 74–6603. NIETO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1118.

No. 74–6604. DONOVAN *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, ET AL. Super. Ct. Cal., County of San Luis Obispo. Certiorari denied.

No. 74–6605. LAAMAN *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 114 N. H. 794, 331 A. 2d 354.

No. 74–6607. PORTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–6608. KIRNON *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 625.

No. 74–6610. WHITE *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 74–6612. FERNANDEZ *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 74–6613. NOWAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 74–6614. FRIESEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6615. MONTEER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 2d 1047.

No. 74–6616. FALK *v.* CARTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 74–6617. KIRVELAITIS *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 213.

No. 74–6618. GUTHRIE *v.* AULT, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 74–6619. BRICE *v.* COLLINS, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 74–6620. CLEMONS *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied.

No. 74–6623. DAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 2d 796.

No. 74–6625. MARXUACH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 503.

No. 74–6626. McINTIRE *v.* WASHINGTON; and
No. 74–6627. MANLY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 85 Wash. 2d 120, 530 P. 2d 306.

No. 74–6630. VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 546.

No. 74–6633. WARREN ET AL. *v.* NORMAN REALTY CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 730.

No. 74–6631. FARMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6634. BAKER, AKA WILLIAMS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 394 Mich. 764.

No. 74–6635. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 906.

No. 74–6636. EAGAN, AKA GRIFFITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 1392.

No. 74–6637. JACKSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 74–6638. SMITH *v.* MONTANYE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 1355.

No. 74–6639. JIMENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 897.

No. 74–6640. WRIGHT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 944, 324 N. E. 2d 550.

No. 74–6641. WOKOJANCE *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 210.

No. 74–6644. MCKENDRICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 74–6645. EPPERSON *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 74–6646. TWEED *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 74–6648. VANCIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 1378.

No. 74–6649. CORUM *v.* DELAWARE SUPERIOR COURT. C. A. 3d Cir. Certiorari denied.

No. 74–6650. MEDINA *v.* HOGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1401.

No. 74–6652. GLOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 390.

No. 74–6654. DUBARR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6655. CUNHA *v.* BREWER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 511 F. 2d 894.

No. 74–6656. FARMER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6657. INGLE *v.* POGUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 74–6658. GOFF ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 825.

No. 74–6659. HORNIAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 74–6660. VAUGHN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 293 Ala. 365, 304 So. 2d 6.

No. 74–6667. JOHNSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 840.

No. 74–6663. SWANSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–6664. LATHAM *v.* NEW YORK; and
No. 74–6669. TALLEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 74–6665. TUBBS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 636.

No. 74–6668. CLEMONS *v.* KUBENA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1405.

No. 74–6671. JOHNSON *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 312 So. 2d 341.

No. 74–6672. SHANNON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6674. GAZAL *v.* UNITED STATES;
No. 74–6683. CONTI ET AL. *v.* UNITED STATES; and
No. 74–6686. JOSEPH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 29 and 49.

No. 74–6675. ARMOUR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 74–6676. ROYNICA *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 54 Ala. App. 436, 309 So. 2d 475.

No. 74–6677. STEBBINS *v.* D. C. TRANSIT SYSTEM, INC., ET AL. Ct. App. D. C. Certiorari denied.

No. 74–6678. WILLIAMS *v.* NEW YORK. Sup. Ct. N. Y., Kings County. Certiorari denied.

No. 74–6680. GOODMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 706.

No. 74–6679. KAYE *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 106, 513 F. 2d 638.

No. 74–6681. GRAVES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 74–6685. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 209.

No. 74–6687. HUTCHERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 633.

No. 74–6688. BIRCH *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 74–6689. ALLRED *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 55 Ala. App. 74, 313 So. 2d 195.

No. 74–6690. STEWART ET AL. *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 257 Ark. 753, 519 S. W. 2d 733.

No. 74–6693. MCCORMICK *v.* LILLY ET UX. C. A. 10th Cir. Certiorari denied.

No. 74–6694. CLEMONS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 317 N. E. 2d 859.

No. 74–6695. BLANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 625.

No. 74–6696. MCCRAY *v.* SULLIVAN, CORRECTIONS COMMISSIONER. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 1332.

No. 74–6698. TOTHEROW *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 539 S. W. 2d 812.

No. 74–6700. MCCULLOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 74–6702. WHITE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 74–6703. BUTLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6704. MOSS *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 323 N. E. 2d 748.

No. 74–6705. PERES-GRISALEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 1400.

No. 74–6706. BURROWS ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6707. BOWERSKI, AKA BONAFONTI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 1071.

No. 74–6708. LERMA *v.* ESTELLE, CORRECTIONS DIRECTOR C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1190.

No. 74–6710. COLE, AKA PRIDE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 3d 749, 532 P. 2d 857.

No. 74–6711. KOPAS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied.

No. 74–6712. BRASCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 816.

No. 74–6714. MARCHESANI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 496 F. 2d 527.

No. 74–6721. DUFFY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 857, 331 N. E. 2d 695.

No. 74–6722. MOORE *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 74–6724. MONTANO-SEVILLA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 74–6725. MCGINNESS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–6726. ORBIZ, AKA LLACA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 513 F. 2d 816.

No. 74–6727. EPPERSON *v.* SCHOENBERGER ET AL. C. A. 5th Cir. Certiorari denied.

No. 74–6728. KNIGHT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 503.

No. 74–6729. THORNTON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 309 So. 2d 266.

No. 74–6730. GARDNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 2d 334.

No. 74–6732. RESNICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 799.

No. 74–6739. RAITPORT *v.* BALLARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 74–6737. LUNA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–6741. PIPKIN, AKA PATMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6745. ADAMS *v.* STONE, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–6746. LUCKEY *v.* WEBBER. Ct. App. Wash. Certiorari denied.

No. 74–6748. FAIR *v.* CITY OF TAMPA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 309 So. 2d 5.

No. 74–6749. BECKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 74–6750. DEES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1405.

No. 74–6751. GARDNER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6752. MARRERO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 2d 12.

No. 74–6753. BENNETT *v.* DIRECTOR OF INTERNAL REVENUE FOR NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–6755. EMERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 74–6756. MAGEE *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied.

No. 75–2. BROWN ET AL. *v.* D. C. TRANSIT SYSTEM, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 173 U. S. App. D. C. 130, 523 F. 2d 725.

No. 74–6757. SMITH *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–6759. DONNER *v.* GOODHART, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–1. WINDOM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 989.

No. 75–5. SERRA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–6. DURKEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–7. GREAT NORTHERN RAILWAY CO. ET AL. *v.* PULLMAN CO. C. A. 7th Cir. Certiorari denied. Reported below: 514 F. 2d 325.

No. 75–10. ANONYMOUS *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 427.

No. 75–11. NORTHERN CALIFORNIA POWER AGENCY *v.* FEDERAL POWER COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 168 U. S. App. D. C. 288, 514 F. 2d 184.

No. 75–12. AIR EAST, INC., DBA ALLEGHENY COMMUTER, ET AL. *v.* NATIONAL TRANSPORTATION SAFETY BOARD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 512 F. 2d 1227.

No. 75–13. FERGUSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 55 Ala. App. 135, 313 So. 2d 561.

No. 75–15. UNIVERSAL ATHLETIC SALES CO. *v.* PINCHOCK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 904.

No. 75–8. DeLand *v.* Noon et al. C. A. 9th Cir. Certiorari denied.

No. 75–16. Hayes International Corp. *v.* McLucas, Secretary of the Air Force, et al. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 247.

No. 75–18. Huffman *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 518 F. 2d 80.

No. 75–20. Lewis *v.* Tucson School District No. 1 et al. Ct. App. Ariz. Certiorari denied. Reported below: 23 Ariz. App. 154, 531 P. 2d 199.

No. 75–23. Higgins et al. *v.* Village of Jean Lafitte et al. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 306 So. 2d 79.

No. 75–24. Beauty-Style Modernizers, Inc., et al. *v.* Federal Trade Commission; and

No. 75–25. Jakel *v.* Federal Trade Commission. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 625.

No. 75–27. Grunin *v.* International House of Pancakes, a Division of International Industries, Inc. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 114.

No. 75–29. Aircraft & Helicopter Leasing & Sales, Inc. *v.* National Labor Relations Board. C. A. 9th Cir. Certiorari denied.

No. 75–32. Sada *v.* Onion et al. C. A. 5th Cir. Certiorari denied.

No. 75–43. First National Bank & Trust Company of Vidalia, Georgia *v.* Fidelity Standard Life Insurance Co. et al. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 272.

No. 75–33. FIRESTONE TIRE & RUBBER CO. *v.* GRIGGS. C. A. 8th Cir. Certiorari denied. Reported below: 513 F. 2d 851.

No. 75–39. OLIVE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–40. O'DELL ET AL. *v.* SCHOOL DISTRICT OF INDEPENDENCE, MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 521 S. W. 2d 403.

No. 75–45. TANG ET AL. *v.* CRAVER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 626.

No. 75–47. ORR *v.* FRANK R. MACNEILL & SON, INC. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 166.

No. 75–49. SUNSET COVE, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 1089.

No. 75–51. CHVOSTA *v.* TOWNSHIP OF BAINBRIDGE, OHIO, ET AL. Ct. App. Ohio, Geauga County. Certiorari denied.

No. 75–53. DEJESUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 520 F. 2d 298.

No. 75–54. MOUNT ET VIR *v.* SUMNER. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 626.

No. 75–57. MANARITE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 896.

No. 75–61. CARR *v.* MERCY HOSPITAL, INC. C. A. 5th Cir. Certiorari denied.

No. 75–65. INGLEWOOD RESIDENTS' PROTECTIVE ASSN. *v.* CITY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–64. GRINDLAY'S BANK (UGANDA), LTD. *v.* J. ZEEVI & SONS, LTD., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 220, 333 N. E. 2d 168.

No. 75–69. JOURNEY *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 257 Ark. 1007, 521 S. W. 2d 210.

No. 75–72. FITCH ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 1013.

No. 75–75. LUCAS *v.* "BRINKNES" SCHIFFAHRTS GES. FRANZ LANGE G. M. B. H. & Co., K. G., ET AL. C. A. 3d Cir. Certiorari denied.

No. 75–77. HOLLY *v.* OHIO EDISON CO. Ct. App. Ohio, Ottawa County. Certiorari denied.

No. 75–78. SOUZA ET AL. *v.* ROMERO. C. A. 9th Cir. Certiorari denied.

No. 75–79. MEAD ET UX. *v.* NACEY ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 23 Ariz. App. 121, 531 P. 2d 166.

No. 75–80. LITMAN ET UX. *v.* QUARTO MINING CO. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 2d 73, 326 N. E. 2d 676.

No. 75–85. WELCH *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 309 So. 2d 537.

No. 75–87. KILBRIDE *v.* SUPERIOR COURT OF LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–89. CHEATHAM ET AL. *v.* ILLINOIS CENTRAL GULF RAILROAD CO. ET AL. C. A. 6th Cir. Certiorari denied.

No. 75-84. FIREFIGHTERS COMMITTEE TO PRESERVE CIVIL SERVICE, INC., ET AL. *v.* FIREBIRD SOCIETY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 504.

No. 75-91. LOUISIANA AFFILIATE OF THE NATIONAL ORGANIZATION FOR THE REFORM OF MARIJUANA LAWS (NORML) ET AL. *v.* GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1400.

No. 75-96. COLONIAL REALTY CORP. *v.* MACWILLIAMS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 1187.

No. 75-98. DOE NO. 1 *v.* BANCO FRANCÊS E BRASILEIRO, S. A. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 592, 331 N. E. 2d 502.

No. 75-100. TERRY, JUDGE *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: 262 Ind. 667, 323 N. E. 2d 192.

No. 75-103. JOHNSON MANUFACTURING COMPANY OF LUBBOCK *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 153.

No. 75-105. PERLMAN *v.* PITCHESS, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 75-106. KNOSTMAN *v.* HARDY. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 299 So. 2d 172.

No. 75-116. UNION OIL COMPANY OF CALIFORNIA *v.* WIMBERLY. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 75–121. JULIA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 814, 331 N. E. 2d 680.

No. 75–135. SHUMATE & CO., INC., ET AL. *v.* NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 147.

No. 75–136. YOUNGER, ATTORNEY GENERAL OF CALIFORNIA *v.* TAHOE REGIONAL PLANNING AGENCY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 2d 215.

No. 75–141. BINKLEY *v.* HENDRICKSON. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 316 N. E. 2d 376.

No. 75–144. SUAREZ ET UX. *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 75–148. ZEVCHIK *v.* NORFOLK & WESTERN RAILWAY CO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 75–149. FIRST BANK & TRUST COMPANY OF BOCA RATON, TRUSTEE *v.* TOWN OF PALM BEACH ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 298 So. 2d 443.

No. 75–156. DALLAS CAP & EMBLEM MFG., INC. *v.* BOSTON PROFESSIONAL HOCKEY ASSN., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1004.

No. 75–159. RILEY *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 91 Nev. 196, 533 P. 2d 456.

No. 75–131. BENSON *v.* SAMBO'S RESTAURANTS, INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–161. ROMAGUERA ET AL. *v.* AMECO CORP. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 503.

No. 75–162. HUNT *v.* COASTAL STATES MARKETING, INC., CLAIMANT OF A CARGO ON THE HILDA. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 506.

No. 75–165. ADVANCED HYDRAULICS, INC. *v.* OTIS ELEVATOR CO. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 477.

No. 75–170. THOMPSON *v.* CITY OF COVINGTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 630.

No. 75–188. WALTER *v.* NETHERLANDS MEAD, N. V.. C. A. 3d Cir. Certiorari denied. Reported below: 514 F. 2d 1130.

No. 75–189. GOSS ET AL. *v.* ZUCKSWERT. Ct. App. La., 3d Dist. Certiorari denied. Reported below: 304 So. 2d 704.

No. 75–191. PETERMAN *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 328.

No. 75–192. VIRGINIA EX REL. STATE CORPORATION COMMISSION *v.* FARMERS & MERCHANTS NATIONAL BANK. C. A. 4th Cir. Certiorari denied. Reported below: 515 F. 2d 154.

No. 75–194. FALLON *v.* JONAS, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5010. STAAB *v.* WARDEN, NEVADA STATE PRISON. C. A. 9th Cir. Certiorari denied.

No. 75–197. M. W. ZACK METAL CO. *v.* INTSEL CORP. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 624.

No. 75–200. JACOB *v.* JAHNER, EXECUTRIX. Sup. Ct. N. D. Certiorari denied. Reported below: 233 N. W. 2d 791.

No. 75–203. SAUNDERS ARCHERY CO. *v.* WRIST-ROCKET MANUFACTURING CO., INC. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 846.

No. 75–204. DELASHAW *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–218. BEKKEN *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 628.

No. 75–255. CITIZENS FOR BALANCED ENVIRONMENT & TRANSPORTATION, INC., ET AL. *v.* COLEMAN, SECRETARY OF TRANSPORTATION, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 503 F. 2d 601.

No. 75–5003. COOK ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 13 Cal. 3d 663, 532 P. 2d 148.

No. 75–5004. SWOPE *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 263 Ind. 148, 325 N. E. 2d 193.

No. 75–5005. ROSENHOOVER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5007. FUENTES *v.* WORKERS' COMPENSATION APPEALS BOARD OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–5012. LYNCH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 1395.

No. 75–5013. LYON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 524 S. W. 2d 726.

No. 75–5016. CASEY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 525 S. W. 2d 198.

No. 75–5021. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 1404.

No. 75–5023. CUDD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5024. OSNER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 54 Ala. App. 520, 310 So. 2d 241.

No. 75–5025. MACPHERSON *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 533 P. 2d 1103.

No. 75–5026. MCMORRIS *v.* BANKS. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 47 Cal. App. 3d 723, 121 Cal. Rptr. 185.

No. 75–5030. DURHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1281.

No. 75–5041. FORD *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 75–5042. BOYD *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 528 P. 2d 287.

No. 75–5043. HOLSEY *v.* INMATE GRIEVANCE COMMISSION. C. A. 4th Cir. Certiorari denied.

No. 75–5044. FRALEY *v.* CITY OF COLUMBUS. Sup. Ct. Ohio. Certiorari denied. Reported below: 41 Ohio St. 2d 173, 324 N. E. 2d 735.

No. 75–5045. DORROUGH *v.* HOGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 628.

No. 75–5047. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5049. STANBRIDGE *v.* ZELKER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 2d 45.

No. 75–5056. HOLMES *v.* GRIGGS, INSTITUTION SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 75–5060. GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5061. BONNER *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5072. WEEKS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 760.

No. 75–5086. RAITPORT *v.* KNAPP, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5095. CLARK *v.* LOCKHART, CORRECTIONS SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 512 F. 2d 235.

No. 75–5098. SHEEHAN *v.* HUECKER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 632.

No. 75–5105. WHITAKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 194.

No. 75–5108. WOODS ET AL. *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75–5131. THOMPSON *v.* GARLING. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 75–5132. POWELL *v.* RADKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 506 F. 2d 763.

No. 75–5133. VASQUEZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5136. GRIJALVA *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 476, 533 P. 2d 533.

No. 75–5144. YATES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–5147. COVINGTON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–5148. WILLIAMS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 36 N. Y. 2d 829, 331 N. E. 2d 684.

No. 75–5187. WILCYNSKI *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 111 Ariz. 533, 534 P. 2d 738.

No. 75–5214. BARNETT *v.* MACDONALD, DBA KERR, FITZ-GERALD & KERR. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied.

No. 75–5261. MILLER *v.* UNION ELECTRIC CO. C. A. 8th Cir. Certiorari denied.

No. 74–1217. ANDREWS *v.* KNOWLTON, SUPERINTENDENT, UNITED STATES MILITARY ACADEMY, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 509 F. 2d 898.

No. 74–1219. MODERN ASPHALT PAVING & CONSTRUCTION CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 509 F. 2d 1256.

No. 74–1249. SKLAROFF ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 506 F. 2d 837.

No. 74–1260. POMPONIO *v.* UNITED STATES; and
No. 74–1374. PILUSO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 511 F. 2d 953.

No. 74–1265. ZIMMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 74–1290. CAROLLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 507 F. 2d 50.

No. 74–1517. HELIX WATER DISTRICT *v.* CAPITAN GRANDE BAND OF MISSION INDIANS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 514 F. 2d 465.

No. 74–1540. ERICKSON ET AL., TRUSTEES *v.* ALVARES ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 514 F. 2d 156.

No. 74–1644. SHEEHAN *v.* DOYLE ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 513 F. 2d 895.

No. 74–6596. SOLORIO-PADILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 75–22. NATIONAL LABOR RELATIONS BOARD *v.* HERTZKA & KNOWLES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 503 F. 2d 625.

No. 74–1241. IN RE HANSON. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 511 F. 2d 1371.

No. 74–1352. IOWA INDEPENDENT BANKERS *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 167 U. S. App. D. C. 286, 511 F. 2d 1288.

No. 74–1482. TELECO, INC. *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 511 F. 2d 949.

No. 74–1633. ANHEUSER-BUSCH, INC. *v.* TEAMSTERS LOCAL NO. 633, NATIONAL CONFERENCE OF BREWERY & SOFT DRINK WORKERS, ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 511 F. 2d 1097.

No. 74–6629. TAYLOR *v.* BUICK MOTOR DIVISION, GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 75–210. CAPEHART ET AL. *v.* CITY OF CHESAPEAKE ET AL. Cir. Ct. City of Chesapeake, Va. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 74–1426. ALABAMA *v.* PRINCE. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 507 F. 2d 693.

No. 74–1493. LOVE ET AL. *v.* DADE COUNTY SCHOOL BOARD ET AL. C. A. 5th Cir. Motion to strike portions of respondents' brief and certiorari denied. Reported below: 509 F. 2d 806.

No. 74–1505. SIELAFF, CORRECTIONS DIRECTOR *v.* WILLIAMS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 510 F. 2d 634.

No. 74–1552. HARDER, COMMISSIONER, CONNECTICUT STATE WELFARE DEPARTMENT *v.* JOHNSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 512 F. 2d 1188.

No. 74–1624. NEW YORK *v.* DAVIS. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 36 N. Y. 2d 280, 326 N. E. 2d 818.

No. 74–1510. CHANDLER, U. S. DISTRICT JUDGE *v.* BURKETT ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 217.

No. 74–1555. KAISER INDUSTRIES CORP. ET AL. *v.* JONES & LAUGHLIN STEEL CORP. C. A. 3d Cir. Motion of American Patent Law Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 515 F. 2d 964.

No. 74–1625. PATE, FORMER WARDEN, ET AL. *v.* THOMAS ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 516 F. 2d 889.

No. 74–1566. SEACOAST TRANSPORTATION CO. *v.* PEREZ ET AL. Sup. Ct. Fla. Motion of respondent Perez for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition. Reported below: 308 So. 2d 537.

No. 74–1573. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ISLAND CREEK COAL CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 507 F. 2d 650.

No. 74–1574. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ARMCO STEEL CORP. ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART would grant certiorari. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 505 F. 2d 1129.

No. 74–1586. TENORIO, AKA DE TENORIO *v.* MCGOWAN ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 510 F. 2d 92.

No. 75–90. GENERAL TELEPHONE COMPANY OF OHIO *v.* GENE SLAGLE, INC., ET AL. Sup. Ct. Ohio. Motion of Ohio Bell Telephone Co. et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and petition. Reported below: 41 Ohio St. 2d 44, 322 N. E. 2d 640.

No. 74–1645. COIRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant certiorari. Reported below: 516 F. 2d 896.

No. 74–6409. PETERS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. Reported below: 302 So. 2d 888.

No. 74–6720. BAUMGARTEN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 517 F. 2d 1020.

No. 75–21. MICHIGAN *v.* BEAVERS. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 393 Mich. 554, 227 N. W. 2d 511.

No. 75–193. MICHIGAN *v.* MCFARLAND ET AL. Ct. App. Mich. Motion of respondent Moore for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 55 Mich. App. 678, 223 N. W. 2d 302.

No. 75–222. TAYLOR, ACTING CORRECTIONS DIRECTOR, ET AL. *v.* ROBERTS; and

No. 75–5246. ROBERTS *v.* TAYLOR, ACTING CORRECTIONS DIRECTOR, ET AL. Petitions for certiorari before judgment to C. A. 1st Cir. Motion of respondent in No. 75–222 for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 75–5017. AARON *v.* CAPPS, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 507 F. 2d 685.

No. 74–1414. SHUMAR *v.* UNITED STATES; and

No. 74–6518. CLARKE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 635.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Federal Rule App. Proc. 26 (b) authorizes the courts of appeals to permit motions to be made out of time only "for good cause shown." The question in these cases is whether the Government showed good cause for its untimely motion to extend time to petition for rehearing in the Court of Appeals.

Petitioners Shumar and Clarke were convicted in the District Court for the Southern District of Indiana on one count of conspiring to violate 18 U. S. C. § 1955 and on two counts of actually violating § 1955. The Court of Appeals for the Seventh Circuit affirmed the convictions on the substantive counts, but reversed on the conspiracy count, holding that Wharton's Rule barred conviction for both violating and conspiring to violate § 1955. The Court of Appeals entered judgment on July 31, 1974, and denied petitioners' petition for rehearing on September 30. The Government moved on October 4 to stay the mandate pending our decision in *Iannelli* v. *United States*, 420 U. S. 770 (1975), a case which presented the identical Wharton's Rule question decided by the Court of Appeals. The Government did not seek an extension of time to petition for rehearing until October 24, when it sought an extension pending our decision in *Iannelli*. The Court of Appeals granted the extension. Several months later, we held in *Iannelli* that Wharton's Rule does not bar conviction for both violation of § 1955 and conspiracy to do so. The Government then petitioned for rehearing. The Court of Appeals granted rehearing and modified its decision

in light of *Iannelli*, affirming petitioners' convictions on the conspiracy count.

Absent an extension of time or a new entry of judgment, time to petition for rehearing expired on August 14, 14 days after entry of judgment by the Court of Appeals on July 31. Fed. Rule App. Proc. 40 (a). The Government contends, however, that its time to petition for rehearing began to run from the denial of petitioners' petition for rehearing on September 30. But even accepting this doubtful contention,[1] time to petition for rehearing expired on October 14, and, as the Government concedes, its motion to extend time on October 24 was untimely.

The Government argues instead that it satisfied the good-cause requirement of Rule 26 (b) by pointing out that we had granted certiorari in *Iannelli* on the same Wharton's Rule question decided by the Court of Appeals. Admittedly, our grant of certiorari in *Iannelli* would have been good cause to grant a *timely* motion to extend time to petition for rehearing, but that is not the question presented by these cases.

The Government's motion to extend time was itself untimely. Its burden was to show good cause, not only for the extension, but also for its untimely motion

[1] Petitioners, of course, only sought rehearing on the affirmance of the substantive counts of their convictions. The Government fails to explain how the denial of rehearing on the affirmance of these counts extended its time to petition for rehearing on the reversal of the conspiracy count. The Government's claim is far from obvious. Under Fed. Rule App. Proc. 40 (a), time to petition for rehearing runs from the date of entry of judgment. It is doubtful that entry of a denial of rehearing operates as an entry of judgment within the meaning of Rule 40 (a), since that would permit an indefinite succession of petitions for rehearing. It is still more doubtful that entry of a denial of rehearing as to the affirmance of two counts of a conviction constitutes entry of judgment of reversal as to a third count.

for an extension. Rule 26 (b) requires a showing of good cause both for extensions of time and for motions made out of time:

> "The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, *or may permit an act to be done after the expiration of such time . . . .*" (Emphasis added.)

Indeed, of the three earlier Rules upon which Rule 26 (b) was modeled, see Fed. Rule App. Proc. 26 (b), Notes of Advisory Committee, 28 U. S. C. App., p. 7715, two permit motions to extend time outside of the period sought to be extended only upon a showing of excusable neglect, Fed. Rule Civ. Proc. 6 (b); Fed. Rule Crim. Proc. 45 (b), and one permits applications to extend time only within the period sought to be extended, Sup. Ct. Rule 34 (2).[2] The Government was required to show good cause for its delay in seeking an extension.[3]

It failed to do so. Certiorari was granted in *Iannelli* on May 28, 1974. The Court of Appeals first entered judgment over two months later and, according to the Government, its time to seek an extension expired over four months later. The Government does not contend

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[2] Since the promulgation of the Federal Rules of Appellate Procedure, the relevant provisions of the cited Rules have not been changed.

[3] The decisions in *Huddleston* v. *Dwyer*, 322 U. S. 232 (1944), and *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 424 F. 2d 427, 428–431 (CA2), cert. denied *sub nom. Addabbo* v. *Curtiss-Wright Corp.*, 400 U. S. 829 (1970), are not to the contrary. The party seeking rehearing in those cases had good cause for its delay in seeking an extension. Unlike the present cases, there was no evidence that the party was aware, or could readily have become aware, prior to the expiration of time to petition for rehearing, that a case pending in the State Supreme Court might conclusively establish the governing state law.

that its time to move for an extension expired before it had a reasonable opportunity to learn of our grant of certiorari in *Iannelli*, and indeed, it could not make this argument. When the Government moved on October 4 to stay the mandate of the Court of Appeals pending our decision in *Iannelli*, it was aware that certiorari had been granted in *Iannelli*. Assuming, as the Government contends, that it could have timely moved to extend time on October 4, its 20-day delay until October 24 must be attributed solely to inadvertence. If the good-cause requirement of Rule 26 (b) possesses any meaning at all, the inadvertence of a litigant cannot qualify as good cause.

I would grant certiorari to reverse the affirmance of petitioners' conspiracy convictions by the Court of Appeals.

No. 74–1384. CLAY COMMUNICATIONS, INC. *v.* SPROUSE; and

No. 75–17. SPROUSE *v.* CLAY COMMUNICATIONS, INC. Sup. Ct. App. W. Va. Motion of American Newspaper Publishers Assn. for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. MR. JUSTICE DOUGLAS, being of the view, stated in his previous opinions [1] and those of Mr. Justice Black,[2] that any state or federal libel law imposing liability for discussion of public affairs abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari in

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[1] *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 355–360 (1974) (dissenting); *Time, Inc.* v. *Hill*, 385 U. S. 374, 401–402 (1967) (concurring); *Rosenblatt* v. *Baer*, 383 U. S. 75, 88–91 (1966) (concurring).

[2] *Time, Inc.* v. *Hill*, *supra*, at 398–401 (concurring); *Rosenblatt* v. *Baer*, *supra*, at 94–95 (concurring and dissenting); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293–297 (1964) (concurring).

No. 74–1384 and summarily reverse the judgment. Reported below: —— W. Va. ——, 211 S. E. 2d 674.

No. 74–1647. E. W. SCRIPPS CO. ET AL. *v.* THOMAS H. MALONEY & SONS, INC. Ct. App. Ohio, Cuyahoga County. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in his previous opinions [1] and those of Mr. Justice Black,[2] that any state or federal libel law imposing liability for discussion of public affairs abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari and summarily reverse the judgment. Reported below: 43 Ohio App. 2d 105, 334 N. E. 2d 494.

No. 75–224. VILLAGE VOICE, INC., ET AL *v.* RINALDI. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied for want of a final judgment. MR. JUSTICE DOUGLAS is of the view, stated in his previous opinions [1] and those of Mr. Justice Black,[2] that any state or federal libel law imposing liability for discussion of public affairs abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments. He is also of the view, stated in his opinion in *Mills* v. *Alabama*, 384 U. S. 214, 221–222 (1966),[3] that the judgment below is final because further proceedings are precluded in the state court and the present posture of that judgment upon remand will deter others from exercising their constitutional right to discuss public affairs. MR. JUSTICE

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[1] *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 355–360 (1974) (dissenting); *Time, Inc.* v. *Hill*, 385 U. S. 374, 401–402 (1967) (concurring); *Rosenblatt* v. *Baer*, 383 U. S. 75, 88–91 (1966) (concurring).

[2] *Time, Inc.* v. *Hill, supra*, at 398–401 (concurring); *Rosenblatt* v. *Baer, supra*, at 94–95 (concurring and dissenting); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293–297 (1964) (concurring).

[3] Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 484–487 (1975); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241, 246–247 and n. 6 (1974).

DOUGLAS would therefore grant certiorari and summarily reverse the judgment. Reported below: 47 App. Div. 2d 180, 365 N. Y. S. 2d 199.

Rehearing Denied

No. 73–1256. CONNELL CONSTRUCTION CO., INC. *v.* PLUMBERS & STEAMFITTERS LOCAL UNION NO. 100, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL–CIO, 421 U. S. 616;

No. 74–124. BLUE CHIP STAMPS ET AL. *v.* MANOR DRUG STORES, 421 U. S. 723;

No. 74–157. UNITED HOUSING FOUNDATION, INC., ET AL. *v.* FORMAN ET AL., 421 U. S. 837;

No. 74–647. NEW YORK ET AL. *v.* FORMAN ET AL., 421 U. S. 837;

No. 74–1019. GARGOTTO *v.* UNITED STATES, 421 U. S. 987;

No. 74–1144. LAWRENCE ET AL. *v.* SOUTH CAROLINA, 422 U. S. 1025;

No. 74–1170. AUSTIN ET AL. *v.* UNITED STATES ET AL., 422 U. S. 1042;

No. 74–1276. COTTEN *v.* SCHLESINGER, SECRETARY OF DEFENSE, 422 U. S. 1027;

No. 74–1293. CITY OF BLACK JACK, MISSOURI *v.* UNITED STATES, 422 U. S. 1042;

No. 74–1310. EDWARDS UNDERGROUND WATER DISTRICT ET AL. *v.* HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., 422 U. S. 1049;

No. 74–1326. INDIANA HARBOR BELT RAILROAD CO. *v.* UNITED STATES ET AL., 422 U. S. 1042;

No. 74–6162. WHITE *v.* DALTON, U. S. DISTRICT JUDGE, 422 U. S. 1043; and

No. 74–6231. KLEIN *v.* IMMIGRATION AND NATURALIZATION SERVICE, 422 U. S. 1048. Petitions for rehearing denied.

No. 74–6379. PORZUCZEK, GUARDIAN *v.* TOWNER ET AL., 421 U. S. 1014; and

No. 74–6432. GREENE ET AL. *v.* CHANDLER, MAYOR OF MEMPHIS, ET AL., 421 U. S. 1014. Petitions for rehearing denied.

No. 74–1624. LEWIS *v.* STRACHAN SHIPPING CO. ET AL., 409 U. S. 887, 1002. Motion for leave to file second petition for rehearing denied.

No. 73–1888. UNITED STATES *v.* ALASKA, 422 U. S. 184;

No. 74–487. CLOVER BOTTOM HOSPITAL & SCHOOL *v.* TOWNSEND ET AL., 421 U. S. 1007;

No. 74–584. SEARS *v.* DANN, COMMISSIONER OF PATENTS, 422 U. S. 1056;

No. 74–703. PHILLIPS ET AL. *v.* UNITED STATES, 422 U. S. 1056;

No. 74–1130. FRIEDMAN ET AL. *v.* UNITED STATES, 421 U. S. 1004;

No. 74–1259. MANDEL ET AL. *v.* NOUSE ET AL., 422 U. S. 1008;

No. 74–1339. GUMANIS *v.* DONALDSON, 422 U. S. 1052;

No. 74–1347. THOMPSON ET UX. *v.* PROPERTY TAX APPEAL BOARD OF ILLINOIS ET AL., 422 U. S. 1002;

No. 74–6292. SACASAS *v.* HOGAN, WARDEN, 421 U. S. 998;

No. 74–6358. SHINDER *v.* ESMIOL, 421 U. S. 997;

No. 74–6451. MIKELL *v.* GILCHRIST COUNTY, FLORIDA, ET AL., 422 U. S. 1011;

No. 74–6462. WHITE *v.* REYNOLDS ET AL., 422 U. S. 1046; and

No. 74–6487. HUGHES *v.* AULT, CORRECTIONS DIRECTOR, 422 U. S. 1047. Petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these petitions.

No. 74–70. GOLDFARB ET UX. *v.* VIRGINIA STATE BAR ET AL., 421 U. S. 773. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

No. 74–594. WEISBROD *v.* LYNN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL., 420 U. S. 940; and

No. 74–789. SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSN. ET AL. *v.* BRENNAN, SECRETARY OF LABOR, ET AL., 420 U. S. 973. Motions for leave to file petitions for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of these motions.

No. 74–1229. AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL., 422 U. S. 1026. Petition for rehearing denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions.

No. 74–6305. BENNETT *v.* NORTH CAROLINA, 421 U. S. 993. Motion for leave to file petition for rehearing denied.

OCTOBER 10, 1975

Dismissal Under Rule 60

No. 75–30. MONK ET AL. *v.* CHAMBERS & KENNEDY ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 499 F. 2d 263.

OCTOBER 14, 1975

Affirmed on Appeal

No. 75–262. DODGE ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. Affirmed on appeal from D. C. E. D. Mich.

Appeals Dismissed

No. 74–1427. REUBEN L. ANDERSON-CHERNE, INC. *v.* COMMISSIONER OF REVENUE OF MINNESOTA. Appeal

from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 303 Minn. 124, 226 N. W. 2d 611.

No. 75–178. GANSCHOW *v.* GANSCHOW. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 14 Cal. 3d 150, 534 P. 2d 705.

No. 75–5266. PAULEY *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: — Mass. —, 331 N. E. 2d 901.

No. 75–186. GODSY *v.* GODSY. Appeal from Ct. App. Mo., Kansas City District, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 521 S. W. 2d 449.

No. 75–5349. CORRADO ET UX. *v.* CITY OF PROVIDENCE ET AL. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Reported below: 114 R. I. 691, 337 A. 2d 811.

Miscellaneous Orders

No. A–264 (75–471). COLLIS *v.* KENTUCKY BAR ASSN. Ct. App. Ky. Motion to vacate stay heretofore granted by MR. JUSTICE STEWART on September 25, 1975, denied.

No. A–296 (75–409). FINKBEINER, WARDEN *v.* MATTOX. Application for stay of mandate of the United States Court of Appeals for the Seventh Circuit, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, denied.

No. 74–851. SEEBER ET AL. *v.* ALABAMA ET AL. C. A. 5th Cir. Motion of respondents to consolidate this case with No. 74–220, *Hancock* v. *Train* [certiorari granted, 420 U. S. 971], denied.

No. ———. CALLEY *v.* CALLAWAY, SECRETARY OF THE ARMY, ET AL. C. A. 5th Cir. Motion to dispense with printing portions of appendix to petition for writ of certiorari granted. Typewritten or otherwise reproduced copies of nonprinted opinions will be acceptable only if legible.

No. D–57. IN RE DISBARMENT OF PARSONS. It is ordered that Russell Edward Parsons, of Santa Ana, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–58. IN RE DISBARMENT OF TARBOX. It is ordered that Robert Earl Tarbox, of San Francisco, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–59. IN RE DISBARMENT OF NELSON. It is ordered that Raymond Alexander Nelson, of San Anselmo, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. [Restored to calendar, 421 U. S. 906.] Motion for leave to file memorandum suggesting that this Court's holdings after oral argument in these cases at bar raise new question of law granted.

No. 74–1222. WOLFF, WARDEN *v.* RICE. C. A. 8th Cir. [Certiorari granted, 422 U. S. 1055.] Motion of respondent for appointment of counsel granted, and J. Patrick Green, Esquire, of Omaha, Neb., is appointed to serve as counsel for respondent in this case.

No. 74–1270. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL. C. A. 10th Cir. [Certiorari granted, 421 U. S. 998.] Motion of Michael S. Baram et al. for leave to file a brief as *amici curiae* granted.

No. 74–1274. ABBOTT LABORATORIES ET AL. *v.* PORTLAND RETAIL DRUGGISTS ASSN., INC. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1040.] Motion of Alabama Pharmaceutical Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 74–1396. MICHELIN TIRE CORP. *v.* WAGES, TAX COMMISSIONER, ET AL. Sup. Ct. Ga. [Certiorari granted, 422 U. S. 1040.] Motion of Los Angeles County et al. for leave to participate in oral argument as *amici curiae* denied.

No. 75–436. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from C. A. D. C. Cir; and

No. 75–437. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, *ante*, p. 820.] Motion of Brice M. Claggett, Esquire, to permit Ralph K. Winter, Jr., Esquire, to present oral argument *pro hac vice* granted. Motion of Senator Lee Metcalf for leave to permit oral argument on his behalf as *amicus curiae* denied without prejudice to his seeking part of the four hours allotted litigants in these cases.

No. 75–522. TALLANT ET AL. *v.* HENSON, U. S. MARSHAL, ET AL.; and

No. 75–5280. DUNN *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

Certiorari Granted

No. 74–1303. BISHOP *v.* WOOD ET AL. C. A. 4th Cir. Certiorari granted.

No. 74–1563. CITY OF EASTLAKE ET AL. *v.* FOREST CITY ENTERPRISES, INC. Sup. Ct. Ohio. Certiorari granted. Reported below: 41 Ohio St. 2d 187, 324 N. E. 2d 740.

No. 75–19. UNITED STATES *v.* SANTANA ET AL. C. A. 3d Cir. Certiorari granted.

No. 75–185. LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO, ET AL. *v.* WISCONSIN EMPLOYMENT RELATIONS COMMISSION ET AL. Sup. Ct. Wis. Certiorari granted. Reported below: 67 Wis. 2d 13, 226 N. W. 2d 203.

No. 75–250. CITY OF CHARLOTTE ET AL. *v.* LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 518 F. 2d 83.

No. 74–1608. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* FEDERAL POWER COMMISSION; and

No. 74–1619. FEDERAL POWER COMMISSION *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. C. A. D. C. Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions. Reported below: 172 U. S. App. D. C. 32, 520 F. 2d 432.

No. 75–110. SAKRAIDA *v.* AG PRO, INC. C. A. 5th Cir. Certiorari granted. Reported below: 512 F. 2d 141.

No. 75–145. NORTHERN CHEYENNE TRIBE *v.* HOLLOWBREAST ET AL. C. A. 9th Cir. Motions of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 505 F. 2d 268.

No. 75–130. QUINN, COMMISSIONER, CHICAGO FIRE DEPARTMENT *v.* MUSCARE. C. A. 7th Cir. Motion for leave to file petition for writ of mandamus denied. Alternative petition for writ of certiorari granted. Case is recaptioned in this Court to reflect true respondent in this case. Reported below: 520 F. 2d 1212.

Certiorari Denied. (See also No. 75–186, *supra.*)

No. 74–1392. WASHINGTON *v.* LESNICK. Sup. Ct. Wash. Certiorari denied. Reported below: 84 Wash. 2d 940, 530 P. 2d 243.

No. 74–1439. NUSBAUM, JUDGE *v.* GHEZZI, ACTING SECRETARY OF STATE OF NEW YORK, ET AL.; and

No. 74–1468. RUBINO ET AL. *v.* GHEZZI, ACTING SECRETARY OF STATE OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 512 F. 2d 431.

No. 74–1554. MING *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 1061, 513 F. 2d 640.

No. 74–6452. ACOSTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 501 F. 2d 1330 and 509 F. 2d 539.

No. 74–6463. BRANTLEY *v.* SULLIVAN, CORRECTIONS COMMISSIONER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 F. 2d 1401.

No. 74–6546. HOLSEY *v.* CRIMINAL COURT OF BALTIMORE ET AL. C. A. 4th Cir. Certiorari denied.

No. 74–6561. HOLODNAK *v.* AVCO CORP., AVCO-LYCOMING DIVISION. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 2d 285.

No. 74–6699. CANNEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 298 So. 2d 495.

No. 74–6709. BIRCH *v.* KOOTA ET AL. C. A. 2d Cir. Certiorari denied.

No. 74–6743. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 74–6744. BARBEE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 514 F. 2d 418.

No. 74–6747. JOHNSON *v.* KEVE, CORRECTIONS COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 74–6754. FARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 226.

No. 75–37. RYAN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 13.

No. 75–55. PELAEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 303.

No. 75–63. ROSS *v.* REDA, JUDGE. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 1172.

No. 75–74. CONQUE *v.* GAUTHE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1402.

No. 75–94. BREWER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–92. TUNNELL ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 512 F. 2d 1192.

No. 75–108. TROY'S WELDING, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–114. SHAHANE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 1173.

No. 75–120. FINIS P. ERNEST, INC. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 509 F. 2d 1256.

No. 75–127. ASSOCIATED SHOWER DOOR CO., INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 230.

No. 75–133. CLARK *v.* JOHNSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 518 F. 2d 246.

No. 75–147. TUCKER *v.* NEAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 896.

No. 75–171. JENSEN *v.* KILGARIF ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–174. ERNEST *v.* MILLER, ATTORNEY GENERAL OF VIRGINIA. Cir. Ct. City of Richmond, Va., Div. 1. Certiorari denied.

No. 75–176. HOUSTON ENDOWMENT, INC. *v.* DUNLOP, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1190.

No. 75–195. TRIANGLE PUBLICATIONS, INC. *v.* MONTANDON. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 45 Cal. App. 3d 938, 120 Cal. Rptr. 186.

No. 75–177. GARCIA ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 335 A. 2d 217.

No. 75–179. BRAKE *v.* MFA MUTUAL INSURANCE CO. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 525 S. W. 2d 109.

No. 75–196. HAMMOCK *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 97, 212 S. E. 2d 180.

No. 75–198. WALKER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 157 and 295, 212 S. E. 2d 528 and 219 S. E. 2d 76.

No. 75–199. RESSLER *v.* STATES MARINE LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 579.

No. 75–206. BETTER MONKEY GRIP CO. ET AL. *v.* NATIONAL CAR RENTAL SYSTEM, INC. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 724.

No. 75–231. NATIONAL ALFALFA DEHYDRATING & MILLING CO. *v.* AMERICAN POLLUTION PREVENTION CO., INC. Sup. Ct. Minn. Certiorari denied. Reported below: 304 Minn. 191, 230 N. W. 2d 63.

No. 75–232. PACIFIC FIDELITY LIFE INSURANCE CO. ET AL. *v.* DEVOTO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 2d 1.

No. 75–233. DECHIARO ET AL. *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 54, 367 N. Y. S. 2d 353.

No. 75–249. LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* CITY ELECTRIC, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 517 F. 2d 616.

No. 75–241. MOITY *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 313 So. 2d 824.

No. 75–256. BAXTER *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 134 Ga. App. 286, 214 S. E. 2d 578.

No. 75–267. STEPHENS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 522 S. W. 2d 181.

No. 75–5001. VICTORIAN *v.* RODRIGUEZ. C. A. 10th Cir. Certiorari denied.

No. 75–5002. CAMPBELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 516 F. 2d 894.

No. 75–5008. MCCOY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 41.

No. 75–5011. RICON *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 517 F. 2d 628.

No. 75–5019. POLUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 516 F. 2d 1290.

No. 75–5034. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5035. NAPIER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 518 F. 2d 316.

No. 75–5036. WOOTEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 518 F. 2d 943.

No. 75–5039. CANADA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5040. LONG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 878.

No. 75–5038. McCoy *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 75–5051. Phillips *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 509.

No. 75–5053. Young *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–5057. Leshay *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 508.

No. 75–5059. Boyd et al. *v.* Lefrak Organization et al. C. A. 2d Cir. Certiorari denied. Reported below: 509 F. 2d 1110.

No. 75–5071. Dean *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75–5073. Spence *v.* Latting et al. C. A. 10th Cir. Certiorari denied. Reported below: 512 F. 2d 93.

No. 75–5078. Van Meter *v.* Morgan, Sheriff, et al. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 366.

No. 75–5084. Scranton *v.* Whealon. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 2d 99.

No. 75–5085. Nunn *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 1404.

No. 75–5088. Tragas *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 515 F. 2d 511.

No. 75–5089. Turpin *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 75–5093. NEUGEBAUER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5094. ELLERBEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5099. HENDRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 F. 2d 1233.

No. 75–5100. HAYNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 515 F. 2d 275.

No. 75–5101. BUCHANAN *v.* WHEELER. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 630.

No. 75–5103. LATTA *v.* FITZHARRIS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 246.

No. 75–5106. HOOVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–5111. WILKERSON *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 75–5112. PLEASANT *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 632.

No. 75–5114. ALERS *v.* TOLEDO ET AL. C. A. 1st Cir. Certiorari denied.

No. 75–5128. TAYLOR *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 313 So. 2d 244.

No. 75–5150. PRESLEY *v.* GATHRIGHT, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 75–5149. HASSAN *v.* WOODHAVEN APARTMENTS, INC. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–5190. LYLE *v.* NATIONAL SURETY CORP. ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 304 So. 2d 743.

No. 75–5241. WEBSTER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 462 Pa. 125, 337 A. 2d 914.

No. 75–5152. MARSHALL *v.* DISTRICT OF COLUMBIA GOVERNMENT ET AL. Ct. App. D. C. Certiorari denied.

No. 75–5244. SLAUGHTER *v.* BRIGHAM YOUNG UNIVERSITY. C. A. 10th Cir. Certiorari denied. Reported below: 514 F. 2d 622.

No. 75–5258. NASSAR *v.* VINZANT, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 519 F. 2d 798.

No. 75–5259. JACKSON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 55 Ala. App. 334, 315 So. 2d 131.

No. 75–5299. BOWMAN *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1404.

No. 74–1282. RATNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in his previous opinions[1] and those

[1] *Miller* v. *California*, 413 U. S. 15, 42–47 (1973) (dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 426–433 (1966) (concurring in judgment); *Ginzburg* v. *United States*, 383 U. S. 463, 491–492 (1966) (dissenting); *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957) (dissenting).

of Mr. Justice Black,[2] that any state or federal ban on, or regulation of, obscenity abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari and summarily reverse the judgment. Reported below: 502 F. 2d 1300.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the United States District Court for the Northern District of Texas of mailing obscene magazines and films, and mailing advertisements describing how to obtain such magazines and films, in violation of 18 U. S. C. § 1461, which provides in pertinent part:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; . . .
>
> . . . . . .
>
> "Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> "Whoever knowingly uses the mails for the mailing . . . of anything declared by this section . . . to be nonmailable, . . . shall be fined not more than $5,000 or imprisoned not more than five years . . . ."

The Court of Appeals for the Fifth Circuit affirmed, 502 F. 2d 1300 (1974).

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, which is similar in scope to § 1461, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face."

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[2] *Ginzburg* v. *United States*, *supra*, at 476 (dissenting); *Mishkin* v. *New York*, 383 U. S. 502, 515–518 (1966) (dissenting).

413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Fifth Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

Finally, it appears from the petition and response that the obscenity of the disputed materials was not adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 74–1430. SANDQUIST *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in his previous opinions [1] and those of Mr. Justice Black,[2]

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

[1] *Miller* v. *California*, 413 U. S. 15, 42–47 (1973) (dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (dissenting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 426–433 (1966) (concurring in judgment); *Ginzburg* v. *United States*, 383 U. S. 463, 491–492 (1966) (dissenting); *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957) (dissenting).

[2] *Ginzburg* v. *United States*, *supra*, at 476 (dissenting); *Mishkin* v. *New York*, 383 U. S. 502, 515–518 (1966) (dissenting).

that any state or federal ban on, or regulation of, obscenity abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari and summarily reverse the judgment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Petitioner was convicted in the Municipal Court of Los Angeles of exhibiting allegedly obscene motion pictures in violation of Cal. Penal Code § 311.2 (1970), which provides in pertinent part as follows:

> "(a) Every person who knowingly . . . exhibits to others, any obscene matter is guilty of a misdemeanor."

As used in § 311.2,

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." § 311 (a) (Supp. 1975).

On appeal, the Appellate Department of the Superior Court of California for the County of Los Angeles affirmed the conviction. Certification to the Court of Appeal was sought and denied.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult*

Theatre I v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" in § 311 (a), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari and, since the judgment of the Appellate Department was rendered after *Miller*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

Further, it appears from the petition and response that the obscenity of the disputed materials was not adjudged by applying local community standards. Based on my dissent in *Hamling* v. *United States*, 418 U. S. 87, 141 (1974), I believe that, consistent with the Due Process Clause, petitioner must be given an opportunity to have his case decided on, and to introduce evidence relevant to, the legal standard upon which his conviction has ultimately come to depend. Thus, even on its own terms, the Court should vacate the judgment below and remand for a determination whether petitioner should be afforded a new trial under local community standards.

No. 74–6176. STEWART *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 223 N. W. 2d 250.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

On September 27, 1971, petitioner was charged in an information filed in the Justice of the Peace Court in Vinton, Iowa, with reckless driving of an automobile in-

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

volved in an accident on September 10, 1971, which resulted in the deaths of two people. On October 12, 1971, the Grand Jury of Benton County, Iowa, indicted petitioner for manslaughter arising from the same set of circumstances as formed the basis of the reckless-driving charge. On December 3, 1971, petitioner was found guilty of reckless driving in Justice of the Peace Court and was sentenced to serve 30 days in the county jail and to pay the costs of the action. Subsequently, petitioner filed a motion to dismiss the manslaughter indictment on the ground that prosecution for manslaughter constituted double jeopardy because of his prior conviction for reckless driving based on the same transaction. The motion to dismiss was overruled, and thereafter petitioner was tried and convicted of manslaughter. Petitioner appealed the manslaughter conviction to the Iowa Supreme Court. That court, divided 5 to 4 on the double jeopardy issue, affirmed the conviction. 223 N. W. 2d 250 (1974).

The two charges leveled against petitioner clearly arose out of the same criminal transaction or episode, yet they were tried separately. In that circumstance, we should grant the petition for certiorari and reverse the manslaughter conviction. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the joinder at one trial, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Waugh* v. *Gray*, 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri*, 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson*, 417 U. S. 957 (1974) (BRENNAN, J., dissenting);

Tijerina v. *New Mexico*, 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White*, 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown*, 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana*, 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory*, 66 N. J. 510, 333 A. 2d 257 (1975).

No. 74–1568. WIND RIVER INDIAN EDUCATION ASSN., INC., ET AL. *v.* WARD ET AL. Sup. Ct. Wyo. Motion of respondents Ward et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 531 P. 2d 872.

No. 74–6553. VARDAS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 518 S. W. 2d 826.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was charged in a two-count indictment; the first count charged robbery by assault, the second count charged robbery by firearms, and the indictment contained an enhancement allegation as to the first count by virtue of a prior conviction. As noted by the court below, both counts related to the same transaction. At petitioner's first trial, on September 5, 1967, the court limited the State to trial on the second count. The trial resulted in a conviction which was subsequently reversed on appeal. 488 S. W. 2d 467 (Tex. Crim. App. 1972). Instead of proceeding to a retrial on the second count of the indictment, however, the State, over petitioner's former jeopardy objection, proceeded to try him on the

first count as compounded by the enhancement allegation which had been abandoned at the 1967 trial. This trial resulted in a conviction which was subsequently affirmed on appeal. 518 S. W. 2d 826 (Tex. Crim. App. 1975).

In my view the rejection of petitioner's former jeopardy claim was error. Cf. *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting). I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the joinder at one trial, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Stewart* v. *Iowa, ante,* p. 902 (BRENNAN, J., dissenting); *Waugh* v. *Gray,* 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri,* 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States, supra* (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory,* 66 N. J. 510, 333 A. 2d 257 (1975). I would therefore grant the petition for certiorari and reverse the conviction. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See

Heller v. *New York*, 413 U. S. 483, 495 (1973) (BRENNAN, J., dissenting).

No. 75–209. WILLIAMS *v.* BRASEA, INC., ET AL.; and No. 75–225. BRASEA, INC., ET AL. *v.* BENDER WELDING & MACHINE CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 497 F. 2d 67 and 513 F. 2d 301.

No. 75–227. FEDERAL POWER COMMISSION *v.* CONSUMER FEDERATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 169 U. S. App. D. C. 116, 515 F. 2d 347.

No. 75–248. KORHOLZ *v.* DASHO, EXECUTOR, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 515 F. 2d 511.

No. 75–254. DILLARD, JUDGE *v.* WALKER. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 523 F. 2d 3.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Fifth Circuit for the purpose of hearing the appeal in the case of *United States* v. *Carden*, No. 74–3037, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial

duties in the United States Court of Appeals for the Fourth Circuit during the week of November 10, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the District of Columbia Circuit from December 11, 1975, to December 17, 1975, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Third Circuit on April 8 and 9, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

OCTOBER 20, 1975

Affirmed on Appeal

No. 75–279. BAKER ET AL. *v.* OWEN ET AL. Affirmed on appeal from D. C. M. D. N. C. Reported below: 395 F. Supp. 294.

Appeals Dismissed

No. 74–6715. KLINE ET AL. *v.* ILLINOIS. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN would note probable jurisdiction and set

case for oral argument. Reported below: 60 Ill. 2d 246, 326 N. E. 2d 395.

No. 75–207. APPALACHIAN POWER CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal.

No. 75–263. BOARD OF EDUCATION OF ARMSTRONG HIGH SCHOOL DISTRICT No. 225, VERMILION AND CHAMPAIGN COUNTIES, ET AL. *v.* ELLIS, SUPERINTENDENT OF EDUCATIONAL SERVICE REGION, VERMILION COUNTY, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 60 Ill. 2d 413, 328 N. E. 2d 294.

No. 75–295. ALBERT SIMON, INC., ET AL. *v.* MYERSON, COMMISSIONER, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 36 N. Y. 2d 300, 327 N. E. 2d 801.

No. 75–305. GRIGGS, COOPER & CO., INC. *v.* NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA, ET AL.; and

No. 75–315. HEAVEN HILL DISTILLERIES, INC. *v.* NOVAK, LIQUOR CONTROL COMMISSIONER OF MINNESOTA, ET AL. Appeals from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 304 Minn. 28, 229 N. W. 2d 144.

No. 75–284. METROPOLITAN DADE COUNTY, FLORIDA, ET AL. *v.* AEROJET-GENERAL CORP. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 511 F. 2d 710.

No. 75–5081. HOWLETT *v.* FEDERAL NATIONAL MORTGAGE ASSN. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. Reported below: 521 S. W. 2d 428.

No. 74–5314. SMITH *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 536 S. W. 2d 457.

Miscellaneous Orders

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. (LOUISIANA BOUNDARY CASE). The First Accounting of Louisiana filed pursuant to the Decree of June 16, 1975 [422 U. S. 13]; the Accounting by the United States filed pursuant to paragraph 6 (b) of the Decree of June 16, 1975; the Accounting by Louisiana filed pursuant to paragraph 5 of the Decree of June 16, 1975; and the Accounting by the United States filed pursuant to paragraphs 5 (b) and 7 of the Decree of June 16, 1975, referred to the Special Master.

No. 36, Orig. TEXAS *v.* LOUISIANA. Exceptions to the Report of the Special Master set for oral argument in due course. [For earlier orders herein, see, *e. g.*, 421 U. S. 905.]

No. A–151. RAYMOND *v.* UNITED STATES. C. A. 6th Cir. Application for stay of execution of judgment and/or bail pending appeal, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. 74–882. DECANAS ET AL. *v.* BICA ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 422 U. S. 1040.] Motion of petitioners for divided argument denied.

No. 75–82. SHEET METAL WORKERS' INTERNATIONAL ASSN. *v.* CARTER. Ct. App. Ga. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 74–1107. CAPPAERT ET AL. *v.* UNITED STATES ET AL.; and

No. 74–1304. NEVADA EX REL. WESTERGARD *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1041.] Motion of petitioners for additional time for oral argument granted and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 74–1245. LIBERTY MUTUAL INSURANCE CO. *v.* WETZEL ET AL. C. A. 3d Cir. [Certiorari granted, 421 U. S. 987.] Motion of the Attorney General of Ohio for leave to participate in oral argument as *amicus curiae* denied.

No. 75–320. BRANIFF AIRWAYS, INC. *v.* EL PASO COIN CO., INC., ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–5366. FISHER *v.* DISTRICT COURT OF THE SIXTEENTH JUDICIAL DISTRICT OF MONTANA, IN AND FOR THE COUNTY OF ROSEBUD. Sup. Ct. Mont. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–250. CITY OF CHARLOTTE ET AL. *v.* LOCAL 660, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 890.] Motion of respondent Middleton et al. for leave to proceed *in forma pauperis* denied.

No. 75–208. RATCLIFF *v.* TEXAS ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 75–5194. LEWIS *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 75–300. NOVICK ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 75–268 RADZANOWER *v.* TOUCHE ROSS & CO. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 516 F. 2d 896.

No. 75–292. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA ET AL. *v.* MILIVOJEVICH ET AL. Sup. Ct. Ill. Certiorari granted. Reported below: 60 Ill. 2d 477, 328 N. E. 2d 268.

No. 75–312. GRIBBS, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 518 F. 2d 1014.

No. 75–328. UNITED STATES *v.* ORLEANS ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 509 F. 2d 197.

No. 75–339. BUFFALO FORGE CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 517 F. 2d 1207.

Certiorari Denied. (See also Nos. 74–6715 and 75–284, *supra.*)

No. 74–1516. PRESLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 308 So. 2d 85.

No. 74–1605. ROSENFELD *v.* RUMBLE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 498.

No. 75–52. AUSTIN *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 719.

No. 74–6718. STANLEY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 75–59. BRADY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 625.

No. 75–101. VIGI ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 515 F. 2d 290.

No. 75–113. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 72.

No. 75–123. NICHOLS ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 618.

No. 75–132. JEFFORDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 1398.

No. 75–180. INTERSTATE 95 COMMITTEE *v.* COLEMAN, SECRETARY OF TRANSPORTATION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 515 F. 2d 1021.

No. 75–181. HAVERLY ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 224.

No. 75–229. DE FILIPPO ET AL., T/A A & S *v.* FORD MOTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 516 F. 2d 1313.

No. 75–253. HARTE *v.* LEHNHAUSEN, FORMER DIRECTOR, DEPARTMENT OF LOCAL GOVERNMENT AFFAIRS OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 542, 328 N. E. 2d 543.

No. 75-269. NATIONAL LABOR RELATIONS BOARD *v.* DECATURVILLE SPORTSWEAR CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 788.

No. 75–271. PACKAGING INDUSTRIES, INC. *v.* DIEMATIC MANUFACTURING CORP. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 975.

No. 75–275. ADKINS ET AL. *v.* ADICKES ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 264 S. C. 394, 215 S. E. 2d 442.

No. 75–289. SCHULZ *v.* CRESS ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–291. KLEIN *v.* ROBINSON ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 69 N. J. 133, 351 A. 2d 713.

No. 75–293. IRRIGATION & POWER EQUIPMENT, INC., ET AL. *v.* SIMS CONSOLIDATED, LTD. C. A. 10th Cir. Certiorari denied. Reported below: 518 F. 2d 413.

No. 75–296. BERBERIAN *v.* RHODE ISLAND BAR ASSN. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 339 A. 2d 277.

No. 75–297. STEBBINS *v.* CROCKER-CITIZENS NATIONAL BANK. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 2d 784.

No. 75–298. NIX *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 530 S. W. 2d 524.

No. 75–329. KAUFMAN *v.* DUMPSON, ADMINISTRATOR, HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 35 N. Y. 2d 993.

No. 75–304. CONTINENTAL CASUALTY CO. *v.* WINSTON CORP. C. A. 6th Cir. Certiorari denied. Reported below: 508 F. 2d 1298.

No. 75–310. SPERRY RAND CORP. *v.* DEERE & CO. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 2d 1131.

No. 75–316. BISTANY *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 75–319. CUKROWSKI ET AL. *v.* MT. SINAI HOSPITAL, INC., ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 67 Wis. 2d 487, 227 N. W. 2d 95.

No. 75–331. RUFFIN ET AL. *v.* MERCURY RECORD PRODUCTIONS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 222.

No. 75–5020. CARTER *v.* LARKIN. C. A. 5th Cir. Certiorari denied.

No. 75–5037. SIMS *v.* UNITED STATES; and
No. 75–5050. MALONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5062. HARRIS *v.* UNITED STATES;
No. 75–5080. HARRIS *v.* UNITED STATES; and
No. 75–5096. PATRICK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 710.

No. 75–5064. SHAD *v.* UNITED STATES;
No. 75–5065. BYRD *v.* UNITED STATES; and
No. 75–5066. GOBLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 458.

No. 75–5067. HERNANDEZ ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5068. BALDWIN, AKA CHRISTOFILIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5069. MASTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 8.

No. 75–5070. COCHERES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5083. VAN BLARICOM *v.* FORSCHT. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 615.

No. 75–5092. DONOVAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 625.

No. 75–5104. MCMULLEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 2d 917.

No. 75–5113. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1.

No. 75–5117. GARTNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 518 F. 2d 633.

No. 75–5119. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1191.

No. 75–5120. KNIGHT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 1398.

No. 75–5121. ROLLS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5126. BROWN *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1402.

No. 75–5124. WARD *v.* CARPENTER, SHERIFF. C. A. 9th Cir. Certiorari denied.

No. 75–5134. PRITCHARD *v.* JULIAN ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 75–5135. FOSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5137. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 1083.

No. 75–5138. RUMFELT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–5139. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5141. BEY, AKA WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5142. RUSH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5143. HUNTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5145. LEE *v.* UNITED STATES C. A. D. C. Cir. Certiorari denied. Reported below: 168 U. S. App. D. C. 165, 513 F. 2d 423.

No. 75–5151. HANKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1182.

No. 75–5156. MCDONNELL *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 519 F. 2d 1030.

No. 75–5153. BROWN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 821.

No. 75–5155. POPEKO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 771.

No. 75–5174. WOOLLEN *v.* WILLIAMS ET AL. C. A. 4th Cir. Certiorari denied.

No. 75–5180. RAPHIEL ET AL. *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75–5276. VENABLE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 75–5333. MATTHEWS *v.* MILLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 515 F. 2d 511.

No. 75–5361. RODDY *v.* BLACK, REFORMATORY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 1380.

No. 75–5468. CASEY, ADMINISTRATOR *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–226. UNITED STATES *v.* SPINELLA. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 506 F. 2d 426.

No. 75–5400. LA RUFFA, AKA BROOKS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 37 N. Y. 2d 58, 332 N. E. 2d 312.

OCTOBER 29, 1975

Dismissal Under Rule 60

No. 75–5453. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari dismissed under this Court's Rule 60. Reported below: 306 So. 2d 627.

OCTOBER 31, 1975

Dismissal Under Rule 60

No. 75–5075. VICK *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari dismissed under this Court's Rule 60. Reported below: 287 N. C. 37, 213 S. E. 2d 335.

NOVEMBER 3, 1975*

Dismissal Under Rule 60

No. 74–6444. PITTS ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari dismissed under this Court's Rule 60. Reported below: 307 So. 2d 473.

Affirmed on Appeal

No. 75–134. CANNON *v.* GUSTE ET AL. Affirmed on appeal from D. C. E. D. La.

Appeals Dismissed

No. 75–257. BAKER *v.* UNITED STATES. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 514 F. 2d 722.

No. 75–302. SMALL ET AL. *v.* PANGLE, TREASURER OF KANKAKEE COUNTY, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 60 Ill. 2d 510, 328 N. E. 2d 285.

No. 75–333. NORTH *v.* NORTH. Appeal from Sup. Ct. Kan. Motion of appellee for leave to proceed *in forma pauperis* denied. Appeal dismissed for want of substan-

*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date.

tial federal question. Reported below: 217 Kan. 213, 535 P. 2d 914.

No. 75–5342. MATTHEWS *v.* KAVOUKLIS ET AL. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–372. O'DONNELL ET AL. *v.* ANTIN ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 36 N. Y. 2d 941, 335 N. E. 2d 854.

No. 75–5252. LEE ET UX. *v.* CHILD CARE SERVICE DELAWARE COUNTY INSTITUTION DISTRICT ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 461 Pa. 641, 337 A. 2d 586.

Certiorari Granted—Vacated and Remanded. (See also No. 75–245, *ante*, p. 3.)

No. 75–5169. BREAUX *v.* UNITED STATES; and

No. 75–5223. HARP *v.* UNITED STATES. C. A. 5th Cir. Motions for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and cases remanded for further consideration in light of *United States* v. *Hale*, 422 U. S. 171 (1975). Reported below: 513 F. 2d 786.

Miscellaneous Orders

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Report of Special Master received and ordered filed. Exceptions, if any, may be filed by the parties within 45 days. Reply briefs, if any, may be filed within 30 days thereafter. [For earlier orders herein, see, *e. g.*, 419 U. S. 814.]

No. A–323. INTERNAL REVENUE SERVICE *v.* FRUEHAUF CORP. ET AL. C. A. 6th Cir. Motion to vacate stay heretofore granted by MR. JUSTICE STEWART on October 9, 1975, denied.

No. A–318. BURRAFATO ET UX. *v.* UNITED STATES DEPARTMENT OF STATE ET AL. Application for stay of mandate of the United States Court of Appeals for the Second Circuit and/or stay of deportation, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 523 F. 2d 554.

No. A–353 (75–5402). FAISON *v.* WASHINGTON. Super. Ct. Wash., Cowlitz County. Application for stay of enforcement of judgment and sentence, presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. D–47. IN RE DISBARMENT OF MAYES. It having been reported to the Court that Ronald W. Mayes, of Washington, D. C., and Madison, Kan., has been disbarred from the practice of law by the Supreme Court of Kansas, and this Court by order of April 21, 1975 [421 U. S. 927], having suspended the said Ronald W. Mayes from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

It is ordered that the said Ronald W. Mayes, be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 73–861. EAST CARROLL PARISH SCHOOL BOARD ET AL. *v.* MARSHALL. C. A. 5th Cir. [Certiorari granted, 422 U. S. 1055.] Motion of Lawyers' Committee for Civil Rights Under Law for leave to file a brief as *amicus curiae* granted.

No. 74–1222. WOLFF, WARDEN *v.* RICE. C. A. 8th Cir. [Certiorari granted, 422 U. S. 1055.] Motion of the Attorney General of New Jersey for leave to participate in oral argument as *amicus curiae* denied.

No. 73–1596. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* MOW SUN WONG ET AL. C. A. 9th Cir. [Restored to calendar, 420 U. S. 959.] Motion for appointment of counsel granted, and Edward H. Steinman, Esquire, of Santa Clara, Cal., is appointed to serve as counsel for respondents in this case.

No. 74–175. MIDDENDORF, SECRETARY OF THE NAVY, ET AL. *v.* HENRY ET AL.; and

No. 74–5176. HENRY ET AL. *v.* MIDDENDORF, SECRETARY OF THE NAVY, ET AL. C. A. 9th Cir. [Restored to calendar, 421 U. S. 906.] Motion of the Solicitor General to permit Harvey M. Stone, Esquire, to present oral argument *pro hac vice* granted.

No. 74–1304. NEVADA EX REL. WESTERGARD *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, 422 U. S. 1041.] Motion of the Salt River Pima-Maricopa Indian Community et al. for leave to file a brief as *amici curiae* granted.

No. 75–436. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE SENATE, ET AL. Appeal from C. A. D. C. Cir.; and

No. 75–437. BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE SENATE, ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, *ante*, p. 820.] Motion to reconsider motion of Senator Lee Metcalf for leave to permit oral agrument on his behalf as *amicus curiae* denied.

No. 74–1656. MOE, SHERIFF, ET AL. *v.* CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD RESERVATION ET AL.; and

No. 75–50. CONFEDERATED SALISH AND KOOTENAI TRIBES OF FLATHEAD RESERVATION ET AL. *v.* MOE, SHERIFF, ET AL. Appeals from D. C. Mont. [Probable jurisdiction noted, *ante*, p. 819.] Joint motion to dispense with printing appendix and for leave to proceed on original record granted.

No. 74–1560. UNITED STATES *v.* MARTINEZ-FUERTE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 822.] Motion for appointment of counsel granted, and Charles M. Sevilla, Esquire, of San Diego, Cal., is appointed to serve as counsel for respondents in this case.

No. 74–5566. BARRETT *v.* UNITED STATES. C. A. 6th Cir. [Certiorari granted, 420 U. S. 923.] Motion of the Solicitor General to permit Robert B. Reich, Esquire, to present oral argument *pro hac vice* granted.

No. 75–246. UNITED STATES *v.* HOPKINS. Ct. Cl. [Certiorari granted, *ante*, p. 821.] Motion to dispense with printing appendix granted.

No. 75–5014. DOYLE *v.* OHIO; and

No. 75–5015. WOOD *v.* OHIO. Ct. App. Ohio, Tuscarawas County. [Certiorari granted, *ante*, p. 823.] Motion to permit Ronald L. Collins, Esquire, to present oral argument *pro hac vice* on behalf of respondent in both cases granted. Applications for stay of execution and enforcement of judgments and/or bail (Nos. A–94 and A–96), presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. 75–5318. PAYTON *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL.;

No. 75–5441. BRUCE *v.* ESTELLE, CORRECTIONS DIRECTOR;

No. 75–5446. SZIJARTO *v.* CALIFORNIA; and

No. 75–5459. JOHNSON *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75–5170. LOWE ET AL. *v.* HAYNSWORTH, CHIEF JUDGE, U. S. COURT OF APPEALS; and

No. 75–5279. DELEO *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 75–420. UNITED STATES ET AL. *v.* CHESAPEAKE & OHIO RAILWAY CO. ET AL. Appeal from D. C. E. D. Va. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this matter.* Reported below: 392 F. Supp. 358.

Certiorari Granted

No. 75–260. MCDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 513 F. 2d 90.

No. 75–44. BURRELL ET AL. *v.* MCCRAY ET AL. C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 516 F. 2d 357.

No. 75–76. SOUTH DAKOTA *v.* OPPERMAN. Sup. Ct. S. D. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: — S. D. —, 228 N. W. 2d 152.

No. 75–382. FEDERAL ENERGY ADMINISTRATION ET AL. *v.* ALGONQUIN SNG, INC., ET AL. C. A. D. C. Cir. Certiorari granted. In addition to question presented by the petition, the parties are directed to brief and argue applicability of the Anti-Injunction Act, 26 U. S. C. § 7421. Reported below: 171 U. S. App. D. C. 113, 518 F. 2d 1051.

No. 75–5027. BRYAN *v.* ITASCA COUNTY, MINNESOTA. Sup. Ct. Minn. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 303 Minn. 395, 228 N. W. 2d 249.

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*See also note, *supra*, p. 918.

Certiorari Denied. (See also Nos. 75–257, 75–302, and 75–5342, *supra.*)

No. 74–1434. YELLOW FREIGHT SYSTEM, INC. *v.* BUTLER; and

No. 75–41. LOCAL UNION 823, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* BUTLER. C. A. 8th Cir. Certiorari denied. Reported below: 514 F. 2d 442.

No. 74–1511. GROSS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 910.

No. 74–1629. KARRIGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 35.

No. 74–1648. THOMPSON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 309 So. 2d 533.

No. 74–6502. WATKINS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 74–6551. NORMAN *v.* CLANON, MEDICAL FACILITY SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

No. 74–6611. GAMBLE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 95.

No. 74–6622. SELLARS *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 74–6624. RUSS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 313 So. 2d 758.

No. 74–6670. JOHNSON *v.* RESHETYLO, HOSPITAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1403.

No. 74–6692. RHEUARK *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 74–6697. YOUNG *v.* SUPERINTENDENT, MARYLAND CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied.

No. 74–6734. MORRIS *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 1387.

No. 74–6740. THOMAS *v.* CALIFORNIA DEPARTMENT OF MOTOR VEHICLES ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 74–6742. BRANTLEY *v.* SULLIVAN ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–36. DAVIDSON *v.* KIRBY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 504.

No. 75–48. SUTTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 210, 511 F. 2d 448.

No. 75–56. NEVILLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 1302.

No. 75–68. GARY-HOBART WATER CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 284.

No. 75–97. FIELDS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 264 S. C. 260, 214 S. E. 2d 320.

No. 75–99. PARLANE SPORTSWEAR CO., INC. *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 513 F. 2d 835.

No. 75–107. KATRANIS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–117. Ross et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 383.

No. 75–126. Podell *v.* United States; and
No. 75–128. Miller *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 144.

No. 75–143. Duboff *v.* United States; and
No. 75–146. Deutsch *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 518 F. 2d 727.

No. 75–153. Land O'Lakes, Inc., formerly Land O'Lakes Creameries, Inc. *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 514 F. 2d 134.

No. 75–154. Webb *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 59, 514 F. 2d 895.

No. 75–160. Hammonds *v.* New Jersey. Super. Ct. N. J. Certiorari denied.

No. 75–166. Fidelity Television, Inc. *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 225, 515 F. 2d 684.

No. 75–173. MacDonald *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 75–175. Griffith *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1190.

No. 75–187. Kelly *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 519 F. 2d 794.

No. 75–217. Spaganlo et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1403.

No. 75–237. Cobb *v.* United States et al. C. A. 6th Cir. Certiorari denied.

No. 75–183. COSON ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 515 F. 2d 906.

No. 75–228. WELLMAN INDUSTRIES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 1401.

No. 75–234. SUN FIRST NATIONAL BANK OF ORLANDO ET AL. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1107.

No. 75–238. CALLAHAN *v.* SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 83 and 513 F. 2d 51.

No. 75–240. MACDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–242. GEARHEART ET AL. *v.* FEDERAL RESERVE BANK OF CLEVELAND ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 353.

No. 75–258. PARKER *v.* LORENZ, ACTING LIBRARIAN OF CONGRESS, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 58, 514 F. 2d 894.

No. 75–261. BACHRODT CHEVROLET CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 515 F. 2d 512.

No. 75–266. KRAMER, DBA HY KRAMER ENTERPRISES *v.* DURALITE CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 514 F. 2d 1076.

No. 75–282. OLIVER *v.* WOODWARD, JUDGE. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 25 Ill. App. 3d 66, 322 N. E. 2d 240.

No. 75–259. GARDNER ET AL. *v.* NASHVILLE HOUSING AUTHORITY OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 2d 38.

No. 75–286. MARSHALL FOODS, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–287. DIAMOND *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 157.

No. 75–303. IN RE Bossov. Sup Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 439, 328 N. E. 2d 309.

No. 75–318. SHANAHAN ET AL. *v.* NEW JERSEY STATE BOARD OF EDUCATION ET AL. Super. Ct. N. J. Certiorari denied. Reported below: 133 N. J. Super. 34, 335 A. 2d 69.

No. 75–323. IN RE BERRY. C. A. 10th Cir. Certiorari denied. Reported below: 521 F. 2d 179.

No. 75–330. SATOSKAR *v.* INDIANA REAL ESTATE COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 696.

No. 75–332. FIRST CALIFORNIA CO. ET AL. *v.* NEWMAN. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 47 Cal. App. 3d 60, 120 Cal. Rptr. 494.

No. 75–337. COPELAND *v.* FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF LAKE COUNTY ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–344. SMITHEAL *v.* SMITHEAL. Ct. Civ. App. Tex., 2d Sup. Jud. Dist. Certiorari denied. Reported below: 518 S. W. 2d 842.

No. 75–345. HAVERHILL MANOR, INC. *v.* COMMISSIONER OF PUBLIC WELFARE ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 330 N. E. 2d 180.

No. 75–346. SCHANBARGER *v.* KELLOGG ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 451, 335 N. E. 2d 310.

No. 75–347. HINISH *v.* HINISH. Ct. Sp. App. Md. Certiorari denied.

No. 75–349. UMPHRES *v.* SHELL OIL CO. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 420.

No. 75–363. WOOD, DBA NATIONAL PHOTO SERVICES *v.* CHACE COMPANY ADVERTISING, INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–364. CONNOR *v.* HUTTO. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 853.

No. 75–365. WINKELMAN ET AL. *v.* BLYTH & CO., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 518 F. 2d 530.

No. 75–367. IN RE PARKER SQUARE, INC. C. A. 10th Cir. Certiorari denied.

No. 75–368. TORRES *v.* COLORADO. Ct. App. Colo. Certiorari denied. Reported below: —— Colo. App. ——, 536 P. 2d 868.

No. 75–373. SOMBERG ET AL. *v.* ANDERSON ET AL. Sup. Ct. N. J. Certiorari denied. Reported below: 67 N. J. 291, 338 A. 2d 1.

No. 75–374. WARREN *v.* KILLORY, SUPERINTENDENT OF SCHOOLS, BROCKTON, MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 516 F. 2d 894.

No. 75–376. GRIPPE *v.* FRANK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 46 App. Div. 2d 848, 362 N. Y. S. 2d 1010.

No. 75–381. CHACON ET AL. *v.* GRANATA ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 922.

No. 75–383. CITY OF LOUISVILLE ET AL. *v.* GLASSON. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 899.

No. 75–394. BOARD OF EDUCATION OF CITY OF DETROIT ET AL. *v.* MILLIKEN, GOVERNOR OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 679.

No. 75–397. LOUIE, DBA WATERHOLE #1 *v.* DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–399. NORMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 523 S. W. 2d 669.

No. 75–410. COWLES COMMUNICATIONS, INC. *v.* ALIOTO, MAYOR OF SAN FRANCISCO. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 777.

No. 75–412. PHILLIPS PETROLEUM CO. *v.* ADAMS; PHILLIPS PETROLEUM CO. *v.* FIRST NATIONAL BANK OF BORGER; and PHILLIPS PETROLEUM CO. *v.* RIVERVIEW GAS COMPRESSION CO. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 355, 371, and 374.

No. 75–450. PORTER *v.* NOSSEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 511 F. 2d 1395.

No. 75–460. COTTEN ET AL. *v.* TREASURE LAKE, INC. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 770.

No. 75–5031. BONNER *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 75–5048. IRVING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 1325.

No. 75–5063. FLICK *v.* UNITED STATES; and
No. 75–5115. PIERCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 2d 489.

No. 75–5107. MAGLAYA *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 515 F. 2d 265.

No. 75–5123. BARR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 1407.

No. 75–5127. PETERSON *v.* GOODWIN. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 479.

No. 75–5157. LUTTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 514 F. 2d 1095.

No. 75–5159. SIMMONS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 75–5160. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1182.

No. 75–5161. NEWMAN *v.* UNITED STATES; and
No. 75–5162. HOBSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 765.

No. 75–5164. FRANCISCHINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 827.

No. 75–5168. HANNIG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 75–5165. CASTELLANO ET AL. *v.* KOSYDAR, TAX COMMISSIONER OF OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 2d 107, 326 N. E. 2d 686.

No. 75–5172. PARKS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5173. ARNEY *v.* BENNETT, GOVERNOR OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–5175. LAURA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 508.

No. 75–5178. BENAVIDEZ, AKA CHESTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 F. 2d 733.

No. 75–5179. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 509.

No. 75–5183. WRIGHT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 13.

No. 75–5185. KELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 519 F. 2d 366.

No. 75–5186. CANDIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5188. FANNON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1405.

No. 75–5189. KITTINGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 899.

No. 75–5195. WOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 899.

No. 75–5196. PHELPS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1190.

No. 75–5198. JOHNSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 1398.

No. 75–5199. ARCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5201. THOMPSON *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 516 F. 2d 986.

No. 75–5202. PAYNE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 508 F. 2d 1391.

No. 75–5203. WISHMEYER *v.* BOLTON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 1071.

No. 75–5204. DORROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5208. HAAS *v.* BOORMAN. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 628.

No. 75–5210. BURNS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 287 N. C. 102, 214 S. E. 2d 56.

No. 75–5211. JACKSON ET AL. *v.* MICHIGAN. Recorder's Ct. of Detroit. Certiorari denied.

No. 75–5216. JACKSON *v.* YOUNG. Ct. App. Ga. Certiorari denied. Reported below: 134 Ga. App. 368, 214 S. E. 2d 380.

No. 75–5217. MARTIN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1403.

No. 75–5219. SIMPSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 509.

No. 75–5218. KOHLER *v.* SANDSTROM, CORRECTIONS DIRECTOR. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 305 So. 2d 76.

No. 75–5221. STURGEON *v.* DOUGLAS. C. A. 8th Cir. Certiorari denied.

No. 75–5224. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 786.

No. 75–5226. ANTHONY *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5234. MARTINEZ-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 516 F. 2d 318.

No. 75–5235. ROJAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5236. ROBSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 461 Pa. 615, 337 A. 2d 573.

No. 75–5237. WORD, AKA HURD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 519 F. 2d 612.

No. 75–5240. HOLLAND *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 99.

No. 75–5247. METOYER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 538 P. 2d 1066.

No. 75–5250. ALLUMS ET AL. *v.* CALIFORNIA; HICKOX *v.* CALIFORNIA; and MARTIN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 47 Cal. App. 3d 654, 121 Cal. Rptr. 62 (first case).

No. 75–5248. NORWOOD *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 75–5255. KLEINSCHMIDT *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5256. FLANAGAN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 47 App. Div. 2d 959, 367 N. Y. S. 2d 98.

No. 75–5257. SHARLOW *v.* LUCEY, GOVERNOR OF WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5260. DAVALLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5264. COCHRAN *v.* MARKS ET AL. C. A. 6th Cir. Certiorari denied.

No. 75–5269. WASHINGTON *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 315 So. 2d 40.

No. 75–5272. CHAPMAN *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 516 F. 2d 1277.

No. 75–5273. KENYON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 1229.

No. 75–5274. SMITH *v.* RIDDLE, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 70.

No. 75–5285. STOEHR *v.* INDIANA; and

No. 75–5286. STOEHR *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 263 Ind. 208, 328 N. E. 2d 422.

No. 75–5290. ANONYMOUS ET AL. *v.* NORTON, COMMISSIONER OF WELFARE OF CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 168 Conn. 421, 362 A. 2d 532.

No. 75–5287. BYRD *v.* GUILFORD COUNTY SUPERIOR COURT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 587.

No. 75–5288. O'SHEA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5295. BOLENDER ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 24 Ill. App. 3d 804, 322 N. E. 2d 624.

No. 75–5297. CARPENTER *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 901.

No. 75–5298. WILLIAMS *v.* EAST CLEVELAND POLICE DEPARTMENT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1403.

No. 75–5303. RANSOM *v.* DISTRICT OF COLUMBIA BOARD OF PAROLE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 75–5304. VOLLIN ET AL. *v.* KIMBEL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 790.

No. 75–5308. WILSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 41 Ohio St. 2d 236, 325 N. E. 2d 236.

No. 75–5313. ISAACS *v.* UNITED STATES; and

No. 75–5323. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 409.

No. 75–5319. PRINCE *v.* COMMON PLEAS COURT OF ALLEGHENY COUNTY. C. A. 3d Cir. Certiorari denied.

No. 75–5324. GUERRERO *v.* HAUCK, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 75–5317. LLOYD *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1272.

No. 75–5327. PATTERSON *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 75–5328. OLIVER *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 626.

No. 75–5386. LITTLE *v.* NORTH CAROLINA STATE BOARD OF ELECTIONS ET AL. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 304, 212 S. E. 2d 674.

No. 75–5390. BURKS *v.* EGELER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 221.

No. 75–5395. PASTET *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 169 Conn. 13, 363 A. 2d 41.

No. 75–5413. MORETTA *v.* MORETTA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 516 F. 2d 894.

No. 75–5438. SCILLION *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 902.

No. 75–5442. ALDRIDGE ET UX. *v.* LUDWIG-HONOLD MANUFACTURING CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1397.

No. 75–5490. CLARK *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 294 Ala. 493, 318 So. 2d 822.

No. 75–58. JONES ET AL. *v.* DISTRICT OF COLUMBIA REDEVELOPMENT LAND AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART would grant certiorari.

No. 74-6464. MOORE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 379, 327 N. E. 2d 324.

MR. JUSTICE STEWART.

The petitioner's Illinois conviction for first-degree murder was upheld by a closely divided vote in this Court in 1972, *Moore* v. *Illinois*, 408 U. S. 786. Moore had there urged that the state prosecutor's failure to disclose certain exculpatory evidence violated the principles of *Brady* v. *Maryland*, 373 U. S. 83. The Court's ruling that *Brady* had not been violated was based on its interpretation of testimony given in a state post-conviction hearing by a prosecution witness named Sanders.

Sanders had testified at Moore's trial that two days after the murder a person known to Sanders as "Slick" had told Sanders that it was "open season on bartenders" and had confessed that he had shot a bartender in Lansing, a nearby town. (The victim of the murder for which Moore was prosecuted was a bartender in Lansing.) At the trial Sanders had also testified to the effect that it was Moore who had made these incriminating statements. In a pretrial statement not disclosed to the defense, Sanders had told the police that he had first met "Slick" "about six months ago" in a local tavern. Evidence adduced at the post-trial hearing proved that Sanders could not have met Moore then because Moore had been incarcerated in Leavenworth Penitentiary at the time, and Sanders acknowledged that Moore thus could not have been the man he knew as "Slick." This Court viewed these post-trial revelations as indicating only that Sanders had misidentified Moore as "Slick" but not as impeaching Sanders' trial testimony that it was Moore who had confessed to the shooting of a bartender in Lansing. Accordingly, the Court concluded that

"Sanders' misidentification of Moore as Slick was not material to the issue of guilt." 408 U. S., at 797. Four Justices in dissent interpreted Sanders' post-trial testimony as an acknowledgment that "it was impossible that petitioner was the man with whom he had spoken" about the shooting of the bartender in Lansing. *Id.*, at 804 (opinion of MARSHALL, J., joined by DOUGLAS, STEWART, and POWELL, JJ.).

After this Court's decision, Sanders executed an affidavit stating that it was indeed "Slick," and not Moore, who had confessed to the shooting of the Lansing bartender. On the basis of this affidavit the petitioner again turned to the state courts in an effort to overturn his conviction. Over the strong dissent of Mr. Justice Schaefer, those courts denied him relief on the ground that Sanders' affidavit lacked sufficient credibility. 60 Ill. 2d 379, 327 N. E. 2d 324. I do not quarrel with today's denial of Moore's petition for certiorari, for we cannot from this vantage point intelligently reassess the state courts' determination of questions of credibility. I write only to point out that those questions will be fully amenable to reassessment in a federal habeas corpus proceeding. See *Townsend* v. *Sain*, 372 U. S. 293.

No. 75–265. ESTES ET AL. *v.* TASBY ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 517 F. 2d 92.

No. 75–380. SEABOARD COAST LINE RAILROAD CO. *v.* DIXON. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.* Reported below: 303 So. 2d 39.

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*See also note, *supra*, p. 918.

No. 75–334. NORTH *v.* NORTH. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* and certiorari denied. Reported below: 217 Kan. 213, 535 P. 2d 914.

No. 75–387. AZALEA DRIVE-IN THEATRE, INC., ET AL. *v.* SARGOY ET AL., DBA SARGOY, STEIN & HANFT. Sup. Ct. Va. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.* Reported below: 215 Va. 714, 214 S. E. 2d 131.

No. 75–388. BOARD OF SUPERVISORS OF FAIRFAX COUNTY *v.* ALLMAN, TRUSTEE, ET AL. Sup. Ct. Va. Certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 215 Va. 434, 211 S. E. 2d 48.

Rehearing Denied

No. 74–1426. ALABAMA *v.* PRINCE, *ante*, p. 876;

No. 74–6458. SHADD *v.* HOGAN, WARDEN, *ante*, p. 846; and

No. 74–6584. LIPSMAN *v.* GIARDINO ET AL., *ante*, p. 853. Petitions for rehearing denied.

No. 74–6138. RUTHERFORD *v.* CUPP, PENITENTIARY SUPERINTENDENT, 421 U. S. 933. Motion for leave to file petition for rehearing denied.

NOVEMBER 5, 1975

Dismissal Under Rule 60

No. 75–5334. BELL *v.* GEORGIA. Sup. Ct. Ga. Certiorari dismissed under this Court's Rule 60. Reported below: 234 Ga. 473, 216 S. E. 2d 279.

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*See also note, *supra*, p. 918.

NOVEMBER 11, 1975*

Appeals Dismissed

No. 75–434. OSAGE OIL & TRANSPORTATION, INC. *v.* BOARD OF ADJUSTMENT OF FAYETTEVILLE. Appeal from Sup. Ct. Ark. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 258 Ark. 91, 522 S. W. 2d 836.

No. 75–467. WIETHE *v.* CURRY. Appeal from Ct. App. Ohio, Hamilton County, dismissed for want of substantial federal question.

No. 75–5055. RANSONETTE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 522 S. W. 2d 509.

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*MR. JUSTICE DOUGLAS took no part in the consideration or decision of cases in which orders hereinafter reported were announced on this date, with the exception of the following:

No. 74–1110, *Eastern Kentucky Welfare Rights Organization* v. *Simon*, *infra*, p. 943; No. 74–1124, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *infra*, p. 943; No. 74–1445, *Bynum* v. *United States*, *infra*, p. 952; No. 74–6411, *Birnbaum* v. *United States*, *infra*, p. 952; No. 75–62, *Runyon* v. *McCrary*, *infra*, p. 945; No. 75–66, *Fairfax-Brewster School, Inc.* v. *Gonzales*, *infra*, p. 945; No. 75–112, *Saler* v. *Kreiger*, *infra*, p. 946; No. 75–150, *Flores* v. *United States*, *infra*, p. 946; No. 75–152, *Whorley* v. *Virginia*, *infra*, p. 946; No. 75–216, *Saenz* v. *United States*, *infra*, p. 946; No. 75–236, *Kutler* v. *United States*, *infra*, p. 959; No. 75–278, *Southern Independent School Assn.* v. *McCrary*, *infra*, p. 945; No. 75–302, *Small* v. *Pangle*, *infra*, p. 944; No. 75–306, *McCrary* v. *Runyon*, *infra*, p. 945; No. 75–377, *Ludwig* v. *Massachusetts*, *infra*, p. 945; No. 75–428, *McKinney* v. *Parsons*, *infra*, p. 960; No. 75–434, *Osage Oil & Transportation, Inc.* v. *Board of Adjustment of Fayetteville*, *infra*, this page; No. 75–467, *Wiethe* v. *Curry*, *infra*, this page; and No. 75–5046, *Quesada* v. *United States*, *infra*, p. 946.

No. 75–5355. RUSSELL *v.* CITY OF PIERRE. Appeal from Sup. Ct. S. D. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— S. D. ——, 228 N. W. 2d 338.

Certiorari Granted—Vacated and Remanded. (See No. 74–1569, *ante*, p. 9.)

Certiorari Granted—Reversed and Remanded. (See No. 74-1544, *ante*, p. 6; and No. 75–4, *ante*, p. 12.)

Certiorari Granted—Reversed. (See No. 75–139, *ante*, p. 19.)

Miscellaneous Orders

No. A–396. BONK *v.* UNITED STATES. Application for stay of order of the United States Court of Appeals for the Seventh Circuit entered on October 29, 1975, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–403. LEROY ET AL. *v.* CITY OF HOUSTON ET AL. D. C. S. D. Tex. Application for injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. 68, Orig. PENNSYLVANIA *v.* NEW JERSEY. Motion for leave to file bill of complaint set for oral argument.

No. 65, Orig. TEXAS *v.* NEW MEXICO. It is ordered that the Honorable Jean Sala Breitenstein, Senior Judge for the United States Court of Appeals for the Tenth Circuit, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The

Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

The motion of the United States for leave to intervene is referred to the Special Master. [For earlier order herein, see 421 U. S. 927.]

No. 69, Orig. MAINE ET AL. *v.* NEW HAMPSHIRE. Motion for leave to file bill of complaint set for oral argument.

No. 74–1110. EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL. *v.* SIMON, SECRETARY OF THE TREASURY, ET AL.; and

No. 74–1124. SIMON, SECRETARY OF THE TREASURY, ET AL. *v.* EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION ET AL. C. A. D. C. Cir. [Certiorari granted, 421 U. S. 975.] Motion of United Methodist Church et al. for leave to file a brief as *amici curiae* denied.

No. 74–1529. HENDERSON, CORRECTIONAL SUPERINTENDENT *v.* MORGAN. C. A. 2d Cir. [Certiorari granted, *ante*, p. 821.] Motion of respondent for appointment of counsel granted, and Joseph E. Lynch, Esquire, of Auburn, N. Y., is appointed to serve as counsel for respondent in this case.

No. 75–95. TENNESSEE ET AL. *v.* DUNLAP. C. A. 6th Cir. [Certiorari granted, *ante*, p. 821.] Motion to dispense with printing an appendix granted.

No. 75–129. SUCHY *v.* UNITED STATES. C. A. 6th Cir. Motion for leave to file an amended petition for writ of certiorari granted.

No. 75–302. SMALL ET AL. *v.* PANGLE, TREASURER OF KANKAKEE COUNTY, ET AL., *ante*, p. 918. Motion of Illinois Association of Homes for the Aging for leave to file a brief as *amicus curiae* denied.

No. 75–353. PIPER ET AL. *v.* CHRIS-CRAFT INDUSTRIES, INC.;

No. 75–354. FIRST BOSTON CORP. *v.* CHRIS-CRAFT INDUSTRIES, INC.; and

No. 75–355. BANGOR PUNTA CORP. *v.* CHRIS-CRAFT INDUSTRIES, INC. C. A. 2d Cir. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 75–5090. IN RE SANTA CATALINA;

No. 75–5431. THOMAS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA;

No. 75–5507. HARGRAVES *v.* GAGNON, WARDEN;

No. 75–5546. HICKS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA; and

No. 75–5589. TURNER *v.* BLACK, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 75–5227. BROWN ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 75–377. LUDWIG *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. Probable jurisdiction noted. Reported below: —— Mass. ——, 330 N. E. 2d 467.

Certiorari Granted

No. 75–62. RUNYON ET UX., DBA BOBBE'S SCHOOL *v.* MCCRARY ET AL.;

No. 75–66. FAIRFAX-BREWSTER SCHOOL, INC. *v.* GONZALES ET AL.;

No. 75–278. SOUTHERN INDEPENDENT SCHOOL ASSN. *v.* MCCRARY ET AL.; and

No. 75–306. MCCRARY ET AL. *v.* RUNYON ET UX., DBA BOBBE'S SCHOOL, ET AL. C. A. 4th Cir. Certiorari granted, cases consolidated, and a total of two hours allotted for oral argument. Reported below: 515 F. 2d 1082.

No. 75–104. UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition.* Reported below: 510 F. 2d 512.

No. 75–164. PASADENA CITY BOARD OF EDUCATION ET AL. *v.* SPANGLER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 519 F. 2d 430.

No. 75–342. FEDERAL POWER COMMISSION *v.* CONWAY CORP. ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 167 U. S. App. D. C. 43, 510 F. 2d 1264.

No. 75–5387. SIFUENTES *v.* UNITED STATES. C. A. 5th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 74–1560, *United States* v. *Martinez-Fuerte* [certiorari granted, *ante*, p. 822].

*See also note, *supra*, p. 941.

No. 75–455. NADER *v.* ALLEGHENY AIRLINES, INC. C. A. D. C. Cir. Certiorari granted. Reported below: 167 U. S. App. D. C. 350, 512 F. 2d 527.

Certiorari Denied. (See also Nos. 75–434, 75–5055, and 75–5355, *supra.*)

No. 75–112. SALER *v.* KREIGER, SHERIFF, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 632.

No. 75–150. FLORES *v.* UNITED STATES; and

No. 75–5046. QUESADA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1043.

No. 75–152. WHORLEY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 215 Va. 740, 214 S. E. 2d 447.

No. 75–216. SAENZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 766.

No. 74–6682. CLEMMONS *v.* GREGGS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 1338.

No. 74–6731. WOLF ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 60 Ill. 2d 230, 326 N. E. 2d 766.

No. 74–6758. BEISHIR ET AL. *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 522 S. W. 2d 761.

No. 75–270. SCHOOL DISTRICT OF OMAHA ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 530.

No. 75–301. BAUMAN *v.* UNITED STATES. C. C. P. A. Certiorari denied. Reported below: 511 F. 2d 1407.

No. 75–276. TAYLOR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 70.

No. 75–314. RITTER *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 513 F. 2d 942.

No. 75–341. TULIA FEEDLOT, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 800.

No. 75–423. JONES *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–424. JEFFERSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied.

No. 75–425. PRICE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–429. WEYMAN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 235 Pa. Super. 116, 339 A. 2d 78.

No. 75–430. WOOLFOLK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 75–435. CESSNA AIRCRAFT CO. ET AL. *v.* WHITE INDUSTRIES, INC. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 213.

No. 75–445. GENERAL ELECTRIC CREDIT CORP. *v.* GRUBBS, DBA T. R. GRUBBS TIRE & APPLIANCE. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 783.

No 75–452. BOEING CO. ET AL. *v.* VAN GEMERT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1373.

No. 75–448. CAMAJ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–468. IN-CHO CHUNG *v.* PARK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 514 F. 2d 382.

No. 75–5009. CARTER ET AL. *v.* BATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5018. WEST *v.* UNITED STATES; and
No. 75–5307. ANDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 483.

No. 75–5028. SOTOMAYER *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5052. ESSER *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1398.

No. 75–5058. SHIRE *v.* KERNAN. C. A. 3d Cir. Certiorari denied.

No. 75–5079. DEANGELO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: See 312 So. 2d 735.

No. 75–5082. MARTINEZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–5097. BUSH *v.* WALTERS. C. A. 3d Cir. Certiorari denied. Reported below: 513 F. 2d 626.

No. 75–5110. CLARK *v.* CAMPBELL, JUDGE. Sup. Ct. Mo. Certiorari denied.

No. 75–5125. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 519.

No. 75–5140. LYNCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–5171. JOYNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 1397.

No. 75–5192. OWENS *v.* CALIFORNIA; and
No. 75–5428. BAILEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5200. CLINGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–5212. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Certiorari denied.

No. 75–5233. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 685.

No. 75–5238. SULLIVAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–5239. HOWARD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5251. PONDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 522 F. 2d 941.

No. 75–5271. MONTGOMERY *v.* DAGGETT, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 75–5278. CARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5282. RIVERA-MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 1227.

No. 75–5289. WILLIAMS, AKA STEWART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1182.

No. 75–5301. FODDRELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 86.

No. 75–5305. DICKINSON *v.* STRICKLAND ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5309. WEAVER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5311. ALLUIS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 1397.

No. 75–5322. DOUTHIT *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 75–5326. SULLIVAN *v.* HANNON ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–5335. BROWN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 75–5338. KEES *v.* FRAME, WARDEN. Sup. Ct. Pa. Certiorari denied.

No. 75–5343. PRICE *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 520 F. 2d 807.

No. 75–5356. BURNETT *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 234 Ga. 741, 218 S. E. 2d 4.

No. 75–5358. BROADIE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 100, 332 N. E. 2d 338.

No. 75–5360. CADENA *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 75–5371. MINK *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 75–5381. MACKEY *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 46 Cal. App. 3d 755, 120 Cal. Rptr. 157.

No. 75–5379. MCCARTNEY *v.* LATHROP ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5430. FAHRIG ET AL. *v.* FEDERATED DEPARTMENT STORES, INC., DBA RIKE-KUMLER CO. C. A. 6th Cir. Certiorari denied. Reported below: 513 F. 2d 631.

No. 75–5433. GILBERT ET AL. *v.* STERRETT, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 1389.

No. 75–5487. LANDRY *v.* THE GORREDYK ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–5584. WHITE *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 294 Ala. 265, 314 So. 2d 857.

No. 75–202. FERGUSON REORGANIZED SCHOOL DISTRICT R–2 ET AL. *v.* UNITED STATES;

No. 75–214. BERKELEY SCHOOL DISTRICT ET AL. *v.* UNITED STATES; and

No. 75–215. KINLOCH SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE POWELL would grant certiorari in No. 75–214 limited to question whether a federal court has authority to fix and impose the school tax rate upon the residents of the consolidated school district without allowing the rate to be determined in accordance with Missouri law. Reported below: 515 F. 2d 1365.

No. 75–409. FINKBEINER *v.* MATTOX. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma*

pauperis granted. Certiorari denied. Reported below: 519 F. 2d 1404.

No. 74–1445. BYNUM ET AL. *v.* UNITED STATES; and No. 74–6411. BIRNBAUM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 533.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

The "minimization" provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 provides that every order and extension thereof authorizing electronic surveillance shall "contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . ." 18 U. S. C. § 2518 (5). This "minimization" provision, together with other safeguards, *e. g.*, §§ 2518 (3)(a), (b), (c), and (d), constitutes the congressionally designed bulwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967). Congress has explicitly informed us that the "minimization" and companion safeguards were designed to assure that "the order will link up specific person, specific offense, and specific place. Together [the provisions of Title III] are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most precise and discriminate circumstances, which fully comply with the requirement of particularity." S. Rep. No. 1097, 90th Cong., 2d Sess., 102 (1968). These cases afford the Court a particularly appropriate vehicle for fashioning principles to guide authorizing judges in administering the "minimization"

provision—guidance which is absolutely essential if the congressional mandate to confine execution of authorized surveillances within constitutional and statutory bounds is to be carried out.

The urgent need for guidance from this Court clearly emerges from the record in these cases. For the record fairly bristles with apparent instances of indiscriminate and unwarranted invasions of privacy of nontargets of the surveillance.

Two telephones at the home of a friend of petitioner Bynum were the subjects of surveillance orders. The orders authorized federal narcotics agents to overhear and electronically record incoming and outgoing conversations of "Bynum and others as yet unknown." The order as extended for one telephone was for a period of 34 days, and the order for the second telephone covered the last 20 days of that period. The judge who authorized the surveillance left administration of the "minimization" provision to the monitoring agents, being of the view that the facts of the massive narcotics conspiracy under investigation precluded *per se* surveillance guidelines promulgated by him and that minimization would be better achieved by allowing the agents discretion in determining what should be intercepted. But the monitoring agents were not informed by the judge or their superiors of this decision. Rather, Mr. Updike, the Assistant United States Attorney who supervised the surveillance, testified that the agents were instructed to intercept all but privileged attorney-client communications:

> "And with respect to the actual operation of the intercept, my instructions were that they were to record everything except what any inspector felt was a privileged communication, and as to those they were to report to me when anything of that nature occurred or felt something of that nature occurred.

> "But the instructions were that they were to record and to monitor at the start all communications that came over the telephone."

Moreover, the monitoring agents testified that they were unaware of, and had not been informed of, the statutory "minimization" provision. And although Mr. Updike testified that the monitoring agents did have discretion with regard to whether they should monitor a particular conversation (although not with regard to whether they should record it), he conceded that the agents were never informed that they had such discretion; when questioned whether he was "counting on the agents being bored and taking off their earphones as a vehicle by which the minimization objective of the statute would at least in part be accomplished," Mr. Updike responded: "I think that is a fair characterization."

In consequence of this failure in even the slightest respect to comply with the minimization safeguards, every conversation and attempted communication (whether incoming or outgoing) over the target telephones during the period was recorded, and approximately 90% of the completed communications were also contemporaneously monitored by the agents. The Government intercepted 1,974 completed communications, excluding calls to such services as information and the weather, which covered 102 hours of conversation time. Necessarily, calls of short duration will generally have to be monitored *in toto;* agents must inevitably listen briefly to all calls in order to determine the parties to and the nature of the conversation. But 501 conversations lasted at least three minutes, and 71 of these longer calls were made by Bynum's child's teenage babysitter Donna, who was totally innocent of any knowledge of her employer's criminal enterprise; her conversations were therefore "communications not . . . subject to

interception . . . ." The other party in each of these conversations, which accounted for 14½ hours of the intercepted conversations, was not a member of the narcotics conspiracy, and the conversations, which were sometimes the subject of jokes by the monitoring agents, were often of a highly personal and intimate nature. Although Mr. Updike was apprised of the nature of these calls during the course of the surveillance, he nevertheless ordered that Donna's calls be intercepted because they could be "useful" for such matters as determining where actual members of the conspiracy were and thus assist the visual surveillance aspect of the investigation. Of course, since Donna's conversations would not themselves have satisfied the particularity standard of Title III and would not, therefore, have independently been the proper subject of electronic surveillance, they clearly fall within the category whose interception Congress intended to be minimized under § 2518 (5).

Similarly, there were 47 calls of at least 10 minutes duration between petitioner Garnett, who resided at the address of the target telephones and in whose name they were listed, and personal friends who were not members of the conspiracy. Although Garnett was a "known" member of the conspiracy, whose calls might be subject to a lengthier initial surveillance period before their innocent nature was established, these personal calls of considerable length accounted for 19 hours of intercepted communications.

Also intercepted were a substantial number of calls involving attorneys, thus implicating both the attorney-client privilege and Sixth Amendment considerations. The judge had been informed that the surveillance might eventuate in the interception of such communications, particularly since some attorneys were suspected of involvement in the conspiracy. However, the judge ex-

plicitly directed that privileged communications should not be monitored, and he assumed that the interception of such calls would be reported to him. Nevertheless, the judge was told, contrary to the fact, in each interim report on the conduct of the surveillance that no privileged communications had been intercepted; indeed, although 67 telephone conversations involving attorneys were intercepted, 42 of which at least arguably fell within the attorney-client privilege and most of which were recognizable as involving attorneys, the judge was never called upon to decide whether any particular conversation was privileged. Moreover, although Mr. Updike had informed the monitoring agents generally that "privileged communications" of attorneys were not to be intercepted, he never instructed the monitoring agents, who were not themselves attorneys, what type of attorney-client communications would fall within the scope of the privilege.

Also significant, particularly in light of the companion statutory directive that surveillance must terminate as soon as its directives are accomplished, see § 2518 (5), is the fact that Mr. Updike and the monitoring agents were not informed of other developments in the investigation, such as the results of visual surveillance conducted on the suspects or the information supplied by informants. Mr. Updike did not receive the wiretap log entries of the monitoring agents on a daily basis, and he did not scrutinize the logs to evaluate the actual evidentiary value of the information derived from the surveillance. Moreover, although written reports were periodically submitted to the judge during the surveillance period, and although the wiretap log entries were attached to these reports, the reports themselves were conclusory statistical summaries concerning the intercepted communications, and actually revealed that a substantial

percentage of the overheard conversations were not narcotics related.

Eight conversations derived from this surveillance were introduced at petitioners' trial over timely objection, and numerous other conversations may have resulted in the acquisition of other evidence. The "minimization" issue thus has a substantial impact on the rights of these litigants. But it has a significantly broader impact. These cases thus present important questions, and in light of the extensive record upon which to predicate review, afford a particularly appropriate opportunity to delineate standards and procedures to guide law enforcement officials and supervising judges in implementing the minimization strictures of § 2518 (5). More specifically, the cases would permit us to address the following important issues:

(1) Is the mechanical recording of a conversation not actually overheard, an "interception" within 18 U. S. C. § 2510 (4)? The District Court held that conversations recorded but not overheard were not "intercepted." This holding substantially influenced the court's determination that the "minimization" provision had not been violated. The Court of Appeals declined to address the question, holding that the difference between what was only recorded and what was recorded and overheard was both *de minimis* and not measurable on the record.

(2) Was this round-the-clock surveillance conducted in a manner consistent with § 2518 (5), construing that section, as we must, in light of the proscription of general warrants by the Fourth Amendment? The answer to that question necessarily requires that we first specify what standards and procedures govern the determination whether minimization mandated by the section was effected.

(3) What constitutes adequate judicial oversight of

the surveillance to effect minimization? Must the judge keep records of all contacts between the judge and the monitoring agents? Must patterns of innocent or privileged calls be brought to the judge's attention so that he can make an informed contemporaneous determination of the relative evidentiary value of the surveillance compared with the invasion of privacy which it entails? Must the names of suspected co-conspirators be brought to the judge's attention so he can order varying initial surveillance periods in which the agents should determine whether a call is licit or illicit, with only spot monitoring thereafter to ensure that the parties to or the nature of the call have not changed? Must any surveillance directives of the supervising judge be conveyed to the actual monitoring agents, and can a *post hoc* analysis that intercepted conversations were illicit excuse a failure to make an actual minimization effort? Must the judge be informed not only of the conduct of the surveillance, but of the conduct of other aspects of the investigation of which it is but a part, so that the surveillance may be terminated as soon as its objectives are achieved or the wiretap becomes otherwise superfluous to the investigation?

(4) If the surveillance in these cases did not comply with the "minimization" requirement, what is the appropriate remedy? In particular, should suppression be limited to conversations which should not themselves have been intercepted, or should all conversations derived from a surveillance not conducted so as to minimize improper interception be suppressed?

These questions, in the context of a conspiracy investigation conducted through electronic surveillance, are substantial federal issues that merit our plenary review. Such problems are likely to be recurring, and we plainly fail in our judicial responsibility when we do not review

these cases to give content to the congressional mandate of "minimization."

I would therefore grant the petitions limited to the questions presented respecting the "minimization" provision, § 2518 (5), and set the cases for oral argument.

No. 75-236. KUTLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in previous opinions by himself [1] and by Mr. Justice Black,[2] that any federal ban on, or regulation of, obscenity abridges freedom of speech and of the press contrary to the First Amendment, would grant certiorari and summarily reverse the judgment. Reported below: 517 F. 2d 1400.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of shipping obscene films by common carrier in interstate commerce in violation of 18 U. S. C. § 1462, and of conspiracy to violate § 1462 and to transport the films in interstate commerce for the purpose of sale or distribution in violation of 18 U. S. C. § 1465. Section 1462 provides in pertinent part:

> "Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—
>
> "(a) any obscene, lewd, lascivious, or filthy book,

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[1] *United States* v. *12 200-Ft. Reels of Film*, 413 U. S. 123, 130–138 (1973) (dissenting); *Ginzburg* v. *United States*, 383 U. S. 463, 491–492 (1966) (dissenting); *Roth* v. *United States*, 354 U. S. 476, 508–514 (1957) (dissenting).

[2] *Ginzburg* v. *United States*, *supra*, at 476 (dissenting).

pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

. . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

The Court of Appeals for the Third Circuit affirmed the convictions. 517 F. 2d 1400.

I adhere to my dissent in *United States* v. *Orito*, 413 U. S. 139, 147 (1973), in which, speaking of 18 U. S. C. § 1462, I expressed the view that "[w]hatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face." 413 U. S., at 147–148. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, and, since the judgment of the Court of Appeals for the Third Circuit was rendered after *Orito*, reverse.* In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

No. 75–428. MCKINNEY *v.* PARSONS. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS, being of the view, stated in previous opinions by himself [1] and by

*Although four of us would grant certiorari and reverse the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

[1] *Miller* v. *California*, 413 U. S. 15, 42–47 (1973) (dissenting); *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 70–73 (1973) (dis-

Mr. Justice Black,[2] that any state ban on, or regulation of, obscenity abridges freedom of speech and of the press contrary to the First and Fourteenth Amendments, would grant certiorari and summarily reverse the judgment. Reported below: 513 F. 2d 264.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

Petitioner was convicted in the Circuit Court of Jefferson County, Ala., of violating the obscenity ordinance of the city of Birmingham. Birmingham Ordinance No. 67–2, § 3, provides in pertinent part:

> "It shall be unlawful for any person to knowingly . . . exhibit, distribute or have in his possession with intent to distribute, exhibit, sell or offer for sale . . . any obscene matter."

As used in Ordinance No. 67–2, "obscene" meant at the time of the alleged offenses:

> "that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." § 1.

On direct appeal, the Alabama Court of Criminal Appeals dismissed when petitioner's appellate brief was untimely filed. Petitions for writs of certiorari were filed with the Supreme Court of Alabama and denied. A petition for a writ of certiorari was filed with this Court and denied for the reason that the judgment below rested upon an adequate state ground. *McKinney* v.

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senting); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 426–433 (1966) (concurring in judgment).

[2] *Mishkin* v. *New York*, 383 U. S. 502, 515–518 (1966) (dissenting).

Birmingham, 409 U. S. 895 (1972). Thereafter, a petition for habeas corpus relief was filed in the United States District Court for the Northern District of Alabama. Habeas relief was ultimately denied, and on appeal the Fifth Circuit affirmed. 513 F. 2d 264.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, Ordinance No. 67–2 as it existed at the time of the alleged offenses was constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), I would therefore grant certiorari, vacate the judgment, and remand the case for further proceedings not inconsistent with my dissent in *Paris Adult Theatre I*, *supra*.* See *Wasserman* v. *Municipal Court of Alhambra Judicial District*, 413 U. S. 911 (1973) (BRENNAN, J., dissenting). In that circumstance, I have no occasion to consider whether the other questions presented in this case merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 494 (1973) (BRENNAN, J., dissenting).

NOVEMBER 17, 1975

Affirmed on Appeal

No. 75–168. WHITEHEAD ET AL. *v.* WESTBROOK. Affirmed on appeal from D. C. W. D. Ark.

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*Although four of us would grant certiorari and vacate the judgment, the Justices who join this opinion do not insist that the case be decided on the merits.

No. 74–1418. BUCHANAN ET AL. *v.* EVANS ET AL. Affirmed on appeal from D. C. Del. Reported below: 393 F. Supp. 428.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL join as to Parts I and II–B, dissenting.

Appellants insist that the judgment of the District Court is wrong under our holding in *Milliken* v. *Bradley*, 418 U. S. 717 (1974), while appellees insist that it is consistent with that case. But this case comes here as an appeal from an order of a three-judge District Court enjoining the enforcement of a state statute, 393 F. Supp. 428 (Del. 1975), a question not even present in *Milliken*. The three-judge District Court by its order of April 16, 1975, enjoined appellants from relying upon [1]

[1] Appellees contend, not implausibly, that no injunction was in fact issued in this case, and that the only action of the District Court with respect to Delaware's Educational Advancement Act of 1968 (EAA) was to declare certain provisions unconstitutional. They rely on *Gunn* v. *University Committee*, 399 U. S. 383 (1970), and *Goldstein* v. *Cox*, 396 U. S. 471 (1970), to support their conclusion.

If appellees are correct on this point, of course, appellants should have taken their appeal to the United States Court of Appeals for the Third Circuit rather than to this Court. *Gonzalez* v. *Employees Credit Union*, 419 U. S. 90 (1974).

But in *Gunn*, *supra*, this Court held that "there was no order of any kind either granting or denying an injunction . . . ." 399 U. S., at 387. *Goldstein* v. *Cox*, *supra*, held that a District Court's denial of plaintiffs' motion for summary judgment was not appealable to this Court under 28 U. S. C. § 1253 where plaintiffs in their complaint had sought no preliminary injunction.

Here the operative language of the District Court's order addressed to appellants was that "[i]n preparing any inter-district plan, the Defendant State Board of Education is enjoined from relying upon those provisions of [the EAA] found unconstitutional by this Court." There is thus an injunction, and it is against the enforcement of certain provisions of a state statute. While, for reasons

provisions of a Delaware statute which by their terms had expired six years earlier. Because in doing so I believe the District Court decided an issue that is demonstrably moot, I would reverse its judgment on this point. Since the additional question of whether the *Milliken* issues briefed by the parties are properly before us under any conceivable theory is one which veritably bristles with jurisdictional problems, I would note probable jurisdiction and set the case for argument on these points. The Court's summary affirmance, in my opinion, not only wrongfully upholds an erroneous injunction issued by the District Court, but because of the difficult jurisdictional questions present in this case leaves totally beclouded and uncertain what is decided by that summary affirmance.

I

The challenged Delaware statute, known as the Educational Advancement Act (EAA), was enacted by the legislature in June 1968 "to provide the framework for an effective and orderly reorganization of the existing school districts of this State through the retention of certain existing school districts and the combination of other existing school districts." Del. Code Ann., Tit. 14, § 1001 (1975).[2]

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which follow, I believe that the District Court was wrong in passing on the merits of the statute, that consideration is an argument going beyond the issue of whether or not its order was in fact an injunction as that term is used in § 1253.

[2] The preamble provided as follows:

"The purpose of this chapter is to provide the framework for an effective and orderly reorganization of the existing school districts of this State through the retention of certain existing school districts and the combination of other existing school districts. It is the purpose and intent of the General Assembly to establish the policies, procedures, standards and criteria under which the State Board of Education is authorized to determine and establish the appropriate

Appellant Delaware State Board of Education and its members were placed under an explicit timetable by this statute. By September 1, 1968, they were to develop specific criteria for implementing a reorganization plan in accordance with requirements contained in the statute; by October 24, 1968, they were required to develop a plan conforming to these criteria; and in subsequent months they were to submit the plan to local boards of education, and to receive and pass on their objections to the proposed plan. Del. Code Ann., Tit. 14, §§ 1003, 1004 (a) and (b) (1975). Section 1005 provided that on July 1, 1969, "all proposed school districts contained in the plan as adopted [under § 1004] shall be constituted and established as reorganized school districts." [3]

Section 1004 (c) contained an exclusion which was the basis of appellees' constitutional attack on the statute.[4] It provided that, in contrast to the wide discretion

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reorganized school districts and to implement the reorganization thereof."

[3] Section 1002 (2) defined this term:

" 'Reorganized school district' means a school district which is constituted and established in accordance with the provisions of this chapter, including . . . where applicable, a school district resulting from a consolidation or division in accordance with the provisions of this chapter."

[4] In pertinent part, § 1004 (c) provided:

"On or before March 1, 1969, the State Board of Education shall meet and adopt a final plan of reorganization of school districts which it deems wise and in the best interests of the educational system of this State; provided, that no plan of reorganization of school districts shall be adopted which fails to meet the following requirements:

. . . . . .

"(2) Each proposed school district including more than 1 component former school district shall have a pupil enrollment of not less than 1900 nor more than 12,000 in grades 1 through 12. 'Pupil enrollment' as used in this subsection means enrollment as of September 30, 1968. Excluding vocational-technical districts there

conferred upon the state board with respect to other school districts in the State, the city of Wilmington should constitute a single school district. The District Court sustained appellees' claim that this provision invidiously discriminated against Negroes, finding that although there had been no intent to do so on the part of the legislature, the effect of the statute was to lock in Negro schoolchildren within the Wilmington school district in a way that might not have resulted if that district had been subject to the state board's discretionary power to consolidate as were the remaining districts in the State under the 1968 legislation. The District Court summarized this portion of the EAA in the following language:

> "The key reorganization provisions of the Act provided an *exemption* of approximately one year from the long-standing requirement in Delaware law that consolidation of contiguous school districts must be approved by a referendum in each of the districts affected. 14 Del. C. §§ 1001–05. In other words, for a *limited* time, the State Board of Education was authorized to consolidate school districts according to the dictates of sound educational administration and certain statutory criteria. The Wilmington School District was explicitly excluded from the reorganization powers of the State Board by § 1004 (c)(4): 'The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits.' Wilmington was also excluded implicitly from any consolidation plan by § 1004 (c)(2), which limited

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shall be no fewer than 20 nor more than 25 reorganized school districts.

. . . . .

"(4) The proposed school district for the City of Wilmington shall be the City of Wilmington with the territory within its limits."

> the maximum pupil enrollment in any proposed school district to 12,000." 393 F. Supp., at 438–439 (emphasis added).

The difficulty with the District Court's holding, quite apart from its constitutional merits, is that the statute authorized action by appellant state school board only until July 1, 1969. As the District Court explicitly found, the reorganization powers from which Wilmington was excluded lapsed on that date. After that date, neither the city of Wilmington nor Negro schoolchildren attending schools in the city could suffer any discrimination as a result of the *state board's enforcement* of the *statute:* the state school board no longer had unilateral power to effect consolidation. That step can be accomplished only by approval of the voters in the affected school districts by referendum. Under Del. Code Ann., Tit. 14, § 1027 (1975), while a voter-approved consolidation plan can apparently be rejected by the state board in its discretion, a voter-rejected consolidation plan cannot be resurrected by the state board.[5]

Thus by July 1, 1969, the state board had been relegated, Cinderella-like, to the status which it occupied prior to the 1968 legislation. The provision of § 1004 (c), limiting the authority of the state board with

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[5] Appellees had originally claimed that § 1027 implicitly excluded Wilmington from its operation, 379 F. Supp. 1218, 1219 n. (Del. 1974), and therefore contributed along with § 1004 (c) to the alleged unconstitutional confinement. But the District Court in its present decision found that under § 1027 "consolidation of Wilmington with neighboring school districts is still possible by . . . referendum." 393 F. Supp. 428, 442 n. 29 (Del. 1975). Section 1026, which sets out a similar mechanism for altering reorganized school district boundaries, does expressly exclude Wilmington. Appellees have not pursued their initial charge that this section also unconstitutionally confined black students, and the District Court did not mention § 1026 in its second opinion. Appellees have not asserted either claim on this appeal, and our inquiry can go only to § 1004 (c).

respect to the school district consisting of the city of Wilmington, was relevant, if at all, at the time this case was heard by the three-judge court, only as a historical fact. Whatever may be the proper weight to be accorded this historical fact in the assessment by a single-judge district court of the factors made relevant in *Milliken*, it was *functus officio* as a part of an operative statute.

A three-judge district court cannot enjoin the operation of a statute which has expired by the time the court's decree is entered. Indeed, so strongly has this Court felt about the necessity for a "live controversy" that it has vacated the judgment of the District Court where the statute was repealed *after* the ruling of that court but before decision here. *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412 (1972). *A fortiori*, a prayer for restraint against a state officer's enforcement of a statute which expired *prior* to litigation presents a dead issue. The grant of judicial power in Art. III of the United States Constitution limits federal courts to cases or controversies, and a dispute about the constitutionality of a statute which is no longer in effect is moot in the classical sense.

II

Presumably the Court's summary and unexplained affirmance of the judgment of the District Court upholds its issuance of an injunction against the enforcement of sections of a law which by their own terms have expired. By reason of the summary nature of the Court's action, however, neither the parties nor the District Court can know what additional effect the affirmance here may have. Although the parties have briefed the *Milliken* issues, I believe that there are all but insurmountable jurisdictional difficulties to the Court's reach-

ing them, whether it were to affirm or to reverse the injunctive portion of the District Court's judgment. I would at the very least note probable jurisdiction and hear argument on them in order to make a principled determination as to whether we have authority on this appeal to deal with those issues at all.

A

On the assumption that the District Court was correct in issuing the injunction against the enforcement of the Delaware statute, an assumption with which I disagree for reasons previously stated, there is the most serious question as to whether the Court could reach the *Milliken* issues even if it wished to do so. This case is here on direct appeal only because 28 U. S. C. § 1253 authorizes such appeal "from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This language stands in sharp contrast to the language of 28 U. S. C. § 1252, dealing with direct appeals from district court judgments invalidating Acts of Congress, the relevant language of which is:

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding . . . ."

Construing this language in *United States* v. *Raines*, 362 U. S. 17 (1960), the Court stated that it seemed "to indicate a desire of Congress that the whole case come up . . . ." *Id.*, at 27 n. 7.[6]

[6] The Court in *Raines* contrasted the scope of § 1252 with the scope of 18 U. S. C. § 3731, the Criminal Appeals Act. That

By contrast, the much narrower language of § 1253 allows appeal here not from a final judgment or decree but only from "an order granting or denying . . . an interlocutory or permanent injunction . . . ." It is established by the consistent holdings of this Court that this section, together with 28 U. S. C. § 2281, is to be narrowly, rather than broadly, construed. *Gonzalez* v. *Employees Credit Union,* 419 U. S. 90, 98 (1974); *Phillips* v. *United States,* 312 U. S. 246, 248 (1941).

The Court's opinion in *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 76 (1960), is highly instructive on this point. There the issue was whether, in an appeal pursuant to § 1253, this Court and the District Court had jurisdiction to entertain nonconstitutional attacks on the challenged statute as well as constitutional attacks. The Court held that they did. Mr. Justice Frankfurter and Mr. Justice Douglas in dissent contended they did not. I should think that if at the time of the decision in *Florida Lime Growers* it was a fairly debatable question whether this Court and the District Court could entertain nonconstitutional challenges to the very statute against which the injunction was sought, there could be little doubt that neither our jurisdiction nor the jurisdiction of the District Court would extend still further to embrace issues which were independent of and far more extensive than the assumed "present" invalidity of the challenged statute.

Act allowed the Government a right of appeal from particular types of decisions of a district court prior to trial in a criminal case, and the Court in construing it in *United States* v. *Borden Co.,* 308 U. S. 188, 193 (1939), stated that "[t]he Government's appeal does not open the whole case." The language of § 1253, with which we deal, is much more akin to that of the Criminal Appeals Act than it is to that of § 1252. See also *United States* v. *Keitel,* 211 U. S. 370, 397–399 (1908).

B

Serious as these jurisdictional doubts seem to me, those which flow from the opposite assumption—that the District Court erred in enjoining the enforcement of the provisions of a statute which by their terms had expired—are even more troubling. The prayer [7] seeking

[7] Reopening a desegregation suit that had lain dormant since the mid-sixties, appellees contended that the city's black students were being compelled to attend segregated schools. The claim was threefold: (1) the state board continued to maintain an unconstitutional dual system in New Castle County, of which Wilmington is a part; (2) the State through various practices, *e. g.*, low-cost housing policies, had enforced or approved public and private discrimination resulting in segregated schools; (3) the portions of the EAA establishing a mechanism for school district consolidation, both created a suspect classification in directing that Wilmington be continued as a single school district and prevented the state board from implementing its Fourteenth Amendment duty to dismantle the dual system.

Since the third prong of appellees' claim assertedly ran against the board's enforcement of a state statute, a three-judge court was empaneled. 28 U. S. C. § 2281. The District Court, in two separate opinions, passed upon the entire complaint. The first decision, in July 1974, found that the geographic zoning plan adopted for Wilmington in 1956 had not been effective in eliminating many racially identifiable schools, and that a unitary system had not been established, a failure chargeable to the state board. See 379 F. Supp. 1218, 1221–1223 (Del.). The latter two contentions, since they related to possible interdistrict relief, were postponed until consideration of the proper remedy. Specifically, the claim that the EAA's exclusion of Wilmington unconstitutionally impeded the dismantling process was deemed premature since drastic intradistrict relief might be curative. The parties were ordered to submit alternative intradistrict and interdistrict plans, the latter to incorporate suburban school districts within the county.

Two weeks later, this Court handed down *Milliken* v. *Bradley*, 418 U. S. 717 (1974), which identified the prerequisites to ordering interdistrict relief. The suburban county districts, at the District Court's invitation, intervened as defendants to contest any proposed

injunctive relief against the enforcement of the Delaware statute was filed in the District Court in this case in 1971. At that time, the provisions of § 1004 (c) ulti-

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consolidation remedy. They chose to adopt the state board's pleadings and stand on the evidence already of record.

After oral arguments, the District Court rendered the instant decision. Under its reading of *Milliken* the predicate for interdistrict relief was "racially discriminatory acts of the state or local school districts [that] have been a substantial cause of interdistrict segregation." *Id.*, at 745. So framing its inquiry the District Court found: (1) a percentage of suburban students of both races had, pre-*Brown* v. *Board of Education*, 347 U. S. 483 (1954), traveled into the city to attend segregated schools in Wilmington; (2) the growth of identifiably black schools since *Brown* mirrored the substantial white migration to the suburbs, a demographic shift in part encouraged and assisted by governmental policies, the cumulative effect of which constituted segregative action with interdistrict effects; (3) the passage of the EAA, with its grant of truncated reorganizational power (excluding Wilmington therefrom) to the state board (a) operated not in purpose but in effect to create a suspect racial classification under the Equal Protection Clause, and (b) thus constituted a substantial interdistrict violation under *Milliken*. The District Court concluded as follows:

"Here, the racially discriminatory exclusion of Wilmington prevented the State Board from considering whether sound educational principles dictated a consolidation of Wilmington with other school districts. But for this racial classification, the Board may have consolidated Wilmington with other New Castle County districts, with the result that the racial proportions of the districts would have been altered significantly. Even though the State Board may not have been required to alter the Wilmington District, this Court cannot find that the exclusion from the Board's powers was racially insignificant. On the contrary, the reorganization provisions of the [EAA] played a significant part in maintaining the racial identifiability of Wilmington and the suburban New Castle County school districts. In short, the General Assembly 'contributed to the separation of the races by . . . redrawing school district lines,' Milliken v. Bradley, [418 U. S.,] at 755 . . . (STEWART, J., concurring).[*]" 393 F. Supp., at 445–446.

Footnote [*] elaborated on "redrawing":

"School district reorganization pursuant to [the EAA] amounted

mately struck down by the District Court had been *functus officio* since 1969. I would think that our recent treatment of nonjusticiability in a three-judge court context applies equally to the defect of mootness at the time injunctive relief is sought:

> "[T]hat the complaint was nonjusticiable [is] not merely short of the ultimate merits; it [is] also, like an absence of statutory subject-matter jurisdiction, a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself, leaving final disposition of the complaint to a single judge.
>
> "The three-judge court is not required where the district court itself lacks jurisdiction of the complaint . . . . See *Ex parte Poresky*, 290 U. S. 30, 31 [(1973)]." *Gonzalez* v. *Employees Credit Union*, 419 U. S., at 100.

At the time injunctive relief against the statute was first sought, the action was not one "required" under § 1253 to be heard by a three-judge court because the claim

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to educational redistricting. Invidious discrimination in such redistricting is perforce an 'inter-district violation.' The [EAA] 'redrew' the Wilmington School district lines by removing the existing Wilmington boundaries from the State Board's discretion at the same time that other school districts in Delaware were eligible for consolidation."

Pursuant to the above the District Court declared unconstitutional "[t]hose provisions of [the EAA] excluding the Wilmington School District from eligibility for consolidation," and ordered the parties to submit "alternative plans to remedy the segregation found [in the two opinions] (a) within the present boundaries of [Wilmington], and (b) incorporating other areas of [the] County." *Id.*, at 447. The accompanying order also specifically enjoined the board, in preparing the interdistrict version, "from relying upon" the EAA provisions found unconstitutional.

even at that stage was moot. In such a situation, our appellate jurisdiction is confined solely to corrective action in connection with the district court's mistaken issuance of an injunctive decree:

> "As the case was not one within [§ 2281], the merits cannot be brought to this Court by a direct appeal. [Citations omitted.] But, although the merits cannot be reviewed here in such a case, this Court by virtue of its appellate jurisdiction in cases of decrees purporting to be entered pursuant to [§ 2281], necessarily has jurisdiction to determine whether the court below has acted within the authority conferred by that section and to make such corrective order as may be appropriate to the enforcement of the limitations which that section imposes." *Gully* v. *Interstate Nat. Gas Co.*, 292 U. S. 16, 18 (1934).

See also *Phillips* v. *United States*, 312 U. S., at 248; *Bailey* v. *Patterson*, 369 U. S. 31, 34 (1962); *Gonzalez* v. *Employees Credit Union, supra*, at 95 n. 12.

On the assumption that the District Court wrongly enjoined the enforcement of the statute which was moot at the time the injunction was first sought, the only proper exercise of the jurisdiction conferred upon us by 28 U. S. C. § 1253 is to reverse the injunctive decree issued by the District Court on the ground that the relief sought did not necessitate the convening of a three-judge district court, and remand the case so that it may proceed before a single-judge court.

I think the decision of the Court of Appeals for the Sixth Circuit in a situation virtually identical to that now presented here, and presented to that court in an earlier stage of the *Milliken* litigation, is of some weight in deciding the question of our jurisdiction here. That court held, *Bradley* v. *Milliken*, 468 F. 2d 902, cert.

denied, 409 U. S. 844 (1972), that an order finding an interdistrict violation and requiring submission of plans, but not imposing any remedy, was not appealable from the District Court to the Court of Appeals. Since the jurisdiction conferred upon the courts of appeals by 28 U. S. C. §§ 1291 and 1292 (a) is far more generous in scope than that conferred upon us by 28 U. S. C. § 1253, if the Court of Appeals was right in *Milliken* it is highly doubtful that we have any authority to go beyond review of the District Court's injunctive decree here.

The resolution of each of these issues which I have treated in this dissent is probably not free from doubt, and I could understand a reasoned disposition of the case here which differed from the views which I have expressed. But this is one of those cases in which an opinion of the Court seems to me to be necessary, not merely to resolve an issue concededly present, but to denominate for the benefit of the parties and the District Court what issues the Court conceives to be resolved by its summary affirmance. My dissent from that sort of affirmance here is based on my conviction that it is extraordinarily slipshod judicial procedure as well as my conviction that it is incorrect.

No. 75–361. Association of American Physicians & Surgeons et al. *v.* Mathews, Secretary of Health, Education, and Welfare. Affirmed on appeal from D. C. N. D. Ill. Reported below: 395 F. Supp. 125.

No. 75–497. Bush et al. *v.* Sebesta, Supervisor of Elections, et al. Affirmed on appeal from D. C. M. D. Fla.

No. 75–5116. Betts et al. *v.* Mathews, Secretary of Health, Education, and Welfare, et al. Affirmed on appeal from D. C. Vt. Reported below: 391 F. Supp. 1122.

Appeals Dismissed

No. 75–5408. GREEN *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. Appeal from D. C. Mass. dismissed for want of jurisdiction.

No. 75–5573. GREEN *v.* DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS ET AL. Appeal from D. C. Mass. dismissed for want of jurisdiction.

No. 75–5481. WILLIS *v.* NORTH CAROLINA STATE BOARD OF LAW EXAMINERS. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 288 N. C. 1, 215 S. E. 2d 771.

Vacated and Remanded on Appeal

No. 74–1165. SENDAK, ATTORNEY GENERAL OF INDIANA *v.* NIHISER, DBA MOVIELAND DRIVE-IN THEATER. Appeal from D. C. N. D. Ind. Judgment vacated and case remanded for further consideration in light of *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). Reported below: 405 F. Supp. 482.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL concur, dissenting.

This is a direct appeal from the decision of the three-judge District Court for the Northern District of Indiana declaring an Indiana obscenity public nuisance statute, Ind. Stat. Ann. § 9–2711 *et seq.* (Supp. 1974) (now codified at Ind. Code § 35–30–10.5–1 *et seq.*), patently unconstitutional under the First and Fourteenth Amendments and enjoining its enforcement. For some unknown or at least unexplained reason the Court today remands this case for reconsideration in light of *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592 (1975). I dissent because the three-judge court anticipated that decision and has already discharged the responsibility imposed by that decision.

On October 12, 1973, the prosecuting attorney for Adams County, Ind., filed in the Adams Circuit Court a petition to enjoin and abate appellee's motion picture theater as a public nuisance. On the same day the Circuit Court entered a temporary restraining order with a notice and summons to appear for a hearing on a temporary injunction. Additionally, a subpoena *duces tecum* issued, ordering appellee to produce before the court the film "Deep Throat" and all other motion pictures in his possession, and also a list of the titles and play dates of all motion pictures exhibited by him over the past three years.

The prosecutor was proceeding under the Indiana obscenity public nuisance statute, *supra*. The statute provides that a place which exhibits obscene films is a public nuisance,[1] and provides for a court order requiring the closure for up to one year of any place determined to be a public nuisance.[2] An *ex parte* restraining order may issue for up to 10 days without any prior judicial determination of the obscenity of specific films, and a preliminary injunction may issue if, after hearing, the allegations of the complaint "are sustained to the satisfaction of the court." [3] The statute further provides that at trial the "general reputation of the place" is both admissible and prima facie evidence for proving the existence of the nuisance.[4] If a nuisance is established at trial, an order closing the theater for a year and confiscating all personal property and contents therein shall issue.[5] The owner of a theater closed by either preliminary or permanent injunction may obtain a release from the closing order

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[1] Ind. Stat. Ann. § 9–2711 (d) (Supp. 1974).
[2] § 9–2716 (Supp. 1974).
[3] § 9–2714 (Supp. 1974).
[4] § 2715 (Supp. 1974).
[5] § 9–2716 (Supp. 1974).

only by posting a bond conditioned on the abatement of the nuisance.[6]

On October 19, 1973, appellee filed suit in the United States District Court for the Northern District of Indiana. The complaint sought a declaratory judgment pursuant to 28 U. S. C. §§ 2201–2202 that the statute under which the prosecutor was proceeding was unconstitutional. The complaint also sought to enjoin any further proceedings in the Adams Circuit Court, relief premised on 42 U. S. C. § 1983. On November 14, 1974, the District Court granted summary judgment in favor of appellee and the relief sought.

The Court today vacates the judgment below and remands for further consideration in light of its decision last Term in *Huffman* v. *Pursue, Ltd., supra*. *Huffman*, a case involving a similar nuisance statute from Ohio, held that the principles of *Younger* v. *Harris*, 401 U. S. 37 (1971), which limit federal-court equitable interference with state-court criminal proceedings, are also applicable to certain state-court proceedings which are "in aid of and closely related to criminal statutes . . . ." 420 U. S., at 604. Accordingly, the Court in *Huffman* remanded for a determination whether under the facts of the action "extraordinary circumstances" existed bringing the case within the narrow exceptions to *Younger*'s general bar.

But in the instant case, the District Court anticipated *Huffman* and, for the very reasons relied on by this Court in that case, clearly held that *Younger* principles were applicable.[7] That court then proceeded

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[6] §§ 9–2714, 2716 (Supp. 1974).

[7] The District Court stated:

"[A]ttempts to enforce civil provisions such as the one here may be characterized as civil proceedings utilized to enforce the criminal laws and thus subject to *Younger* in any event. . . . The best ap-

to an extended analysis of the factual situation and concluded that the case fell within the *Younger* exceptions as involving a

> "statutory scheme here . . . arguably in several respects 'flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it.'" 405 F. Supp. 482, 494 (ND Ind. 1974).

The court concluded that the provisions rendering admissible "general reputation" evidence and constituting such evidence sufficient "prima facie" evidence of the existence of the nuisance imposed an unconstitutional prior restraint upon freedom of expression because there was not first required a judicial determination of the obscenity of any specific materials, and because the censor was not required to bear the burden of proving obscenity. The court emphasized that the statute provided for the seizure and destruction of materials which had never been judicially determined to be obscene, and for the seizure and destruction of constitutionally protected materials "merely because they are found in a place which has a reputation of exhibiting obscene films . . . ." *Id.*, at 495. Furthermore, the court emphasized, once a closing order has issued, the statutory scheme permits future restraints against exhibition of all films unless the owner first discharges the burden of demonstrating their nonobscenity. And if such a showing is made and a release from the closing order obtained, the owner must thereafter "determine at his peril what

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proach is not to regard labels 'civil' and 'criminal' as controlling, but to analyze the competing interests which each case presents." 405 F. Supp. 482, 493 (ND Ind. 1974).

is literally or arguably within the definition of 'nuisance.'" *Ibid.*[8]

Finally, and of particular significance, the District Court held the definitional section of the statute to be "flagrantly and patently in violation of express constitutional guarantees." *Id.*, at 496. The statute defines as a nuisance a place at which "lewd, indecent, lascivious, or obscene" films are exhibited.[9] The court reached its conclusion upon the authority of two Indiana Supreme Court decisions which struck down criminal obscenity statutes employing the same definition on the ground that it was too general in nature under the principles announced in *Miller* v. *California*, 413 U. S. 15 (1973). *Mohney* v. *State*, 261 Ind. 56, 300 N. E. 2d 66 (1973); *Stroud* v. *State*, 261 Ind. 58, 300 N. E. 2d 100 (1973).

Thus the case fits precisely within the clearly settled *Younger* exception permitting federal courts to grant relief against state authorities who proceed under a statute "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." This exception, first fashioned in *Watson* v. *Buck*, 313 U. S. 387, 402 (1941), and reaffirmed in *Younger*, 401 U. S., at 53–54, was twice recognized in *Huffman* itself, 420 U. S., at 602, 611. Therefore the judgment of the District Court should be affirmed. The Court's remand to require the

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[8] The statutory scheme also provides for "summary" trial and punishment for violation of an outstanding injunction or closing order, and for any contempt of court. Ind. Stat. Ann. § 9–2717 (Supp. 1974). In this context the District Court found the statutory scheme to be an attempt to circumvent the safeguards attendant upon formal criminal proceedings. 405 F. Supp., at 496.

[9] Ind. Stat. Ann. § 9–2711 (d) (Supp. 1974).

District Court to do over what it has done already makes no sense whatever. I respectfully dissent.[10]

Miscellaneous Orders

No. A–385. LONG VISITOR ET AL. *v.* UNITED STATES. C. A. 8th Cir. Application for bail pending timely filing of petition for writ of certiorari, presented to Mr. Justice Douglas, and by him referred to the Court, denied.

No. A–392 (75–322). VERNELL *v.* UNITED STATES. C. A. 5th Cir. Application for bail, presented to Mr. Justice Douglas, and by him referred to the Court, denied.

No. A–395. LAK MAN TOM *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Motion to vacate stay of deportation heretofore entered by Mr. Justice Douglas on October 30, 1975, granted.

No. A–432. HAMLING ET AL. *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Ninth Circuit, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. 75–110. SAKRAIDA *v.* AG PRO, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 891.] Motion of respondent to limit grant of certiorari denied.

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[10] It is no answer that the Court said in *Huffman* that the Ohio nuisance statute there involved did not fit within the "flagrantly and patently violative of express constitutional prohibitions" exception to *Younger*, 420 U. S., at 611–612, and n. 23, since one Ohio state-court decision had narrowly construed the scope of the statute, *id.*, at 612 n. 23, and another had construed the Ohio definition of obscenity as comporting with the specificity requirements of *Miller* v. *California*, 420 U. S., at 596 n. 4. In sharp contrast, Indiana court decisions have not narrowed the scope of the Indiana nuisance statute and the Indiana Supreme Court, in the two decisions relied upon by the District Court, has held that the same definition of obscenity appearing in Indiana's criminal obscenity statutes does not satisfy the specificity standards of *Miller*.

No. 74–1025. HINES ET AL. *v.* ANCHOR MOTOR FREIGHT, INC., ET AL. C. A. 6th Cir. [Certiorari granted, 421 U. S. 928.] Motion to substitute Chrya J. Cartwright, Administratrix of Estate of Arthur D. Cartwright, as a party petitioner in place of Arthur D. Cartwright, deceased, granted.

No. 75–5402. FAISON *v.* WASHINGTON. Motion for leave to file petition for writ of certiorari denied.

No. 75–5375. JOHNSON *v.* CICCIONE ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 75–5315. CHILEMBWE *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL.;

No. 75–5410. STRATTON *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT; and

No. 75–5427. TUBBS *v.* SUPREME COURT OF TEXAS. Motions for leave to file petitions for writs of mandamus denied.

No. 75–288. SLOAN *v.* COURT OF APPEALS OF NEW YORK. Motion for leave to file petition for writ of mandamus and/or other relief denied.

Probable Jurisdiction Noted

No. 75–73. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL.; and

No. 75–109. HUNERWADEL *v.* BAIRD ET AL. Appeals from D. C. Mass. Probable jurisdiction noted. Cases consolidated and a total of one hour allotted for oral argument. Cases set for oral argument with Nos. 74–1151, *Planned Parenthood of Central Missouri* v. *Danforth*, and 74–1419, *Danforth* v. *Planned Parenthood of Central Missouri* [probable jurisdiction noted, *ante*, p. 819]. Reported below: 393 F. Supp. 847.

Certiorari Granted

No. 75–491. UNITED STATES *v.* AGURS. C. A. D. C. Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 167 U. S. App. D. C. 28, 510 F. 2d 1249.

Certiorari Granted—Vacated and Remanded. (See No. 74–1312, *ante*, p. 44.)

Certiorari Granted—Reversed. (See No. 74–1451, *ante*, p. 48.)

Certiorari Granted—Reversed and Remanded. (See No. 75–5401, *ante*, p. 61.)

Certiorari Denied

No. 73–1750. PITT COUNTY TRANSPORTATION CO. *v.* CAROLINA FREIGHT CARRIERS CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 492 F. 2d 243.

No. 74–973. JONES TRUCK LINES, INC. *v.* RYDER TRUCK LINES, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 507 F. 2d 100.

No. 74–6691. LERNER *v.* MULLEN, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 75–137. GRUBB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–138. YEOMANS ET AL. *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 514 F. 2d 993.

MR. JUSTICE BRENNAN, dissenting.

Petitioners, including citizens of Kentucky and Ohio, instituted this class action on behalf of all purchasers of nonvoting shares of Harmony Loan Co. of Kentucky seeking damages from the Commonwealth of Kentucky, the State of Ohio, certain agencies of these

States, and other defendants not relevant here. Petitioners alleged that the States aided and abetted, or participated in, fraudulent activities in violation of the Securities Act of 1933 (48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.*), the Securities Exchange Act of 1934 (48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.*), and various rules promulgated by the Securities and Exchange Commission (primarily Rule 10b–5, 17 CFR § 240.10b–5 (1975)). The United States District Court for the Southern District of Ohio dismissed the action as to the States on the ground that it was barred by the Eleventh Amendment, and the United States Court of Appeals for the Sixth Circuit affirmed, 514 F. 2d 993 (1975).

In part, this suit is brought by citizens of Kentucky and Ohio against Kentucky, Ohio, and agencies of these States. In that circumstance, the States may not invoke the Eleventh Amendment as to plaintiffs suing their own States, since that Amendment bars federal court suits against States only by citizens of other States. Rather, the question is whether the States may avail themselves of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to petitioners' claims for damages. In my view the States may not assert sovereign immunity for the reason I expressed in dissent in *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 298 (1973): The States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964). Congressional authority to enact the securities laws cited above is found in Art. I, § 8, cl. 3, one of the enumerated powers granted Congress by the States in the Constitution. I remain of the opinion that "because of

its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver," 411 U. S., at 300, and thus have no occasion to inquire whether or not Congress authorized actions against the States for federal securities law violations, or whether Kentucky and Ohio have waived immunity on the facts of this case.

I would grant certiorari and reverse the judgment.

No. 75–151. GREENLEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 899.

No. 75–157. LIEBERT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 542.

No. 75–163. CALIFORNIA & HAWAIIAN SUGAR CO. ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–211. DALTON *v.* INDIANA REFRIGERATOR LINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 795.

No. 75–230. LOVATO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 2d 1270.

No. 75–244. BRAVERMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 522 F. 2d 218.

No. 75–274. BIBBS, ADMINISTRATOR, ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 896, 521 F. 2d 1405.

No. 75–343. DISTRICT 153, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 168 U. S. App. D. C. 77, 512 F. 2d 991.

No. 75–321. R. L. SWEET LUMBER CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 10th Cir. Certiorari denied. Reported below: 515 F. 2d 785.

No. 75–447. CITY OF CLEVELAND *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 2d 403, 330 N. E. 2d 1.

No. 75–459. GOODYEAR TIRE & RUBBER CO. *v.* LOCAL UNION No. 200, UNITED RUBBER, CORK, LINOLEUM & PLASTIC WORKERS OF AMERICA. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 2d 516, 330 N. E. 2d 703.

No. 75–462. NATIONAL CAR RENTAL SYSTEM, INC. *v.* BETTER MONKEY GRIP CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 724.

No. 75–473. HAHN ET UX. *v.* HAHN. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 75–474. STATE BOARD OF ELECTIONS OF ILLINOIS ET AL. *v.* COMMUNIST PARTY OF ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 517.

No. 75–476. CARR ET AL. *v.* MONTGOMERY COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1374.

No. 75–480. NATIONAL EDUCATIONAL ADVERTISING SERVICES, INC. *v.* CASS STUDENT ADVERTISING, INC. C. A. 7th Cir. Certiorari denied. Reported below: 516 F. 2d 1092.

No. 75–486. GROH *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 69 Wis. 2d 481, 230 N. W. 2d 745.

No. 75–489. SPERBERG *v.* GOODYEAR TIRE & RUBBER CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 708.

No. 75–494. OVERSEAS MOTORS, INC. *v.* IMPORT MOTORS LTD., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 119.

No. 75–535. PANDUIT CORP. *v.* BURNDY CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 517 F. 2d 535.

No. 75–5109. HOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5122. HOOK *v.* VERNI ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5167. WILLIAMS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 509.

No. 75–5191. WENDEL *v.* LEVI, ATTORNEY GENERAL, ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5242. ALLEN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 710.

No. 75–5284. WRIGLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 362.

No. 75–5292. EATHERTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 519 F. 2d 603.

No. 75–5293. FARMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 512 F. 2d 160.

No. 75–5310. DE LA FUENTE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5312. RANDLE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–5316. WIDMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–5320. POGUE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1182.

No. 75–5321. NOBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5331. WARREN ET AL. *v.* RAMSEY, SUPERINTENDENT, FEDERAL PRISON INDUSTRIES, ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5345. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–5347. FREEMAN *v.* ARGONAUT INSURANCE CO. ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5350. SCHNEIDER *v.* GRAND. C. A. 8th Cir. Certiorari denied.

No. 75–5352. CAMP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 75.

No. 75–5354. ARBORE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No 75–5365. JACKSON *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 1400.

No. 75–5367. GALLIHER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1404.

No. 75–5377. PETERS *v.* CRAIN BROS., INC. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–5388. HORNE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5389. TYE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 519 F. 2d 586.

No. 75–5392. BUNKERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 1217.

No. 75–5397. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5404. TODA *v.* TANAKA. Sup. Ct. Haw. Certiorari denied.

No. 75–5405. ROUNDTREE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 75–5406. FOYE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 1396.

No. 75–5407. RISTAU *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5409. BURDEAU *v.* TRUSTEES OF THE CALIFORNIA STATE COLLEGES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 507 F. 2d 770.

No. 75–5412. MILLS *v.* MUSCOGEE COUNTY SUPERIOR COURT, COLUMBUS, GA. C. A. 5th Cir. Certiorari denied.

No. 75–5415. FLORES ET AL. *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 764.

No. 75–5417. NAJARES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5435. SWAN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 394 Mich. 451, 231 N. W. 2d 651.

No. 75–5439. BELL *v.* SKELTON, CHAIRMAN, TEXAS BOARD OF PARDONS AND PAROLES, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5451. CONWAY ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 75–5452. BOHMER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 46 Cal. App. 3d 185, 120 Cal. Rptr. 136.

No. 75–5462. GRIFFIN *v.* WARDEN, WEST VIRGINIA STATE PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 517 F. 2d 756.

No. 75–5463. WELSH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5469. LAUB *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75–5531. WILLIAMS *v.* NEW YORK. Sup. Ct. N. Y., New York County. Certiorari denied.

No. 75–5532. HALL *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 75–5535. KING *v.* SCHUBIN, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 527.

No. 75–5557. MALONE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 77.

No. 75–5570. LOCKMAN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 169 Conn. 116, 362 A. 2d 920.

No. 75–5628. McDONALD *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

Rehearing Denied.

No. 74–1374. PILUSO *v.* UNITED STATES, *ante*, p. 874;

No. 74–1384. CLAY COMMUNICATIONS, INC. *v.* SPROUSE, *ante*, p. 882;

No. 74–1442. PETERSON *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., *ante*, p. 830;

No. 74–1474. DICKSON *v.* DICKSON, *ante*, p. 832;

No. 74–1504. BAGLEY PRODUCE, INC. *v.* NATIONAL LABOR RELATIONS BOARD, *ante*, p. 833;

No. 74–1532. COCKE *v.* CANTOR ET AL., *ante*, p. 835;

No. 74–1562. MERETSKY *v.* UNITED STATES, *ante*, p. 836;

No. 74–6323. JORDAN *v.* UNITED STATES, *ante*, p. 842;

No. 74–6707. BOWERSKI, AKA BONAFONTI *v.* UNITED STATES, *ante*, p. 860;

No. 74–6719. ESCOFIL *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 804;

No. 74–6724. MONTANO-SEVILLA *v.* IMMIGRATION AND NATURALIZATION SERVICE, *ante*, p. 861;

No. 74–6729. THORNTON *v.* LOUISIANA, *ante*, p. 861;

No. 74–6753. BENNETT *v.* DIRECTOR OF INTERNAL REVENUE FOR NORTH CAROLINA ET AL., *ante*, p. 862;

No. 75–5. SERRA *v.* UNITED STATES, *ante*, p. 863;

No. 75–156. DALLAS CAP & EMBLEM MFG., INC. *v.* BOSTON PROFESSIONAL HOCKEY ASSN., INC., ET AL., *ante*, p. 868;

No. 75–170. THOMPSON *v.* CITY OF COVINGTON ET AL., *ante*, p. 869; and

No. 75–5114. ALERS *v.* TOLEDO ET AL., *ante*, p. 897. Petitions for rehearing denied.

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No. 75–5214. BARNETT *v.* MACDONALD, DBA KERR, FITZGERALD & KERR, *ante*, p. 873. Petition for rehearing denied.

Assignment Orders

Pursuant to the provisions of 28 U. S. C. § 42, it is ordered that MR. JUSTICE REHNQUIST be, and he is hereby, temporarily assigned to the Ninth Circuit as Circuit Justice.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit from January 12, 1976, to January 16, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Seventh Circuit during the week of May 24, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

NOVEMBER 20, 1975

Dismissal Under Rule 60

No. 75–587. PHILIP B. BASSER ADVERTISING, INC., ET AL. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA. Pa. Commw. Ct. Certiorari dismissed as to petitioner Sorger under this Court's Rule 60. Reported below: 19 Pa. Commw. 272, 339 A. 2d 885.

DECEMBER 1, 1975

Appeals Dismissed

No. 75–172. OHIO *v.* TYMCIO. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 42 Ohio St. 2d 39, 325 N. E. 2d 556.

No. 75–366. AGOST ET AL. *v.* IDAHO ET AL. Appeal from Sup. Ct. Idaho dismissed for want of substantial federal question. Reported below: 96 Idaho 711, 535 P. 2d 1348.

No. 75–378. MALDINI ET AL. *v.* AMBRO, SUPERVISOR OF TOWN OF HUNTINGTON, ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 36 N. Y. 2d 481, 330 N. E. 2d 403.

No. 75–5519. DESA *v.* MICHIGAN. Appeal from Cir. Ct. Mich., Macomb County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Vacated and Remanded on Appeal

No. 75–219. PERINI, CORRECTIONAL SUPERINTENDENT *v.* DOWNEY. Appeal from C. A. 6th Cir. Motion of appellee for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for reconsideration in light of enactment of Ohio Rev. Code Ann. § 2925.03, by Amended Substitute House Bill No. 300, File No. 105, §§ 1, 3, effective Nov. 21, 1975. See Page's Ohio Revised Code, 1975 Legis. Bull. No. 4, p. 261. Reported below: 518 F. 2d 1288.

Certiorari Granted—Reversed and Remanded. (See No. 74–6738, *ante*, p. 64; and No. 75–124, *ante*, p. 67.)

Certiorari Granted—Vacated and Remanded. (See No. 75–5182, *ante*, p. 73.)

Miscellaneous Orders

No. 75–5634. ZBICHORSKI *v.* GAGNON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 75–5502. COZZETTI *v.* HALL, CHIEF JUDGE, U. S. DISTRICT COURT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Denied. (See also Nos. 75–172, 75–378, and 75–5519, *supra.*)

No. 74–6642. FABIAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 74–6647. TYLER ET AL. *v.* RYAN ET AL. C. A. 8th Cir. Certiorari denied.

No. 75–119. KIMBERLY-CLARK CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 511 F. 2d 1352.

No. 75–205. HARRIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 75–213. ROMANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 516 F. 2d 768.

No. 75–327. WOOD *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 948, 521 F. 2d 1405.

No. 75–356. INTERNATIONAL LONGSHOREMEN'S ASSN. ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 511 F. 2d 273.

No. 75–281. SEAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 646.

No. 75–290. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 437.

No. 75–384. ATLANTIC MARINE, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1404.

No. 75–408. RASTELLI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 240, 333 N. E. 2d 182.

No. 75–417. GRIFFITH *v.* NIXON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 518 F. 2d 1195.

No. 75–426. BRATTON, EXECUTOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 832.

No. 75–469. GREENYA *v.* GEORGE WASHINGTON UNIVERSITY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 379, 512 F. 2d 556.

No. 75–496. REGIONAL HIGH SCHOOL DISTRICT No. 5 ET AL. *v.* BAKER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 799.

No. 75–498. DAWSON *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 318 So. 2d 385.

No. 75–499. ROGERS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 258 Ark. 314, 524 S. W. 2d 227.

No. 75–504. IN RE THURMER. Sup. Ct. Cal. Certiorari denied.

No. 75–512. SHAPIRO *v.* BOROUGH OF HIGHTSTOWN. Sup. Ct. N. J. Certiorari denied.

No. 75–517. MACE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 234 Pa. Super. 463, 341 A. 2d 505.

No. 75–521. WILKE, TRUSTEE IN BANKRUPTCY *v.* BROOKS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 515 F. 2d 741.

No. 75–529. FARLEY TERMINAL CO., INC. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 1095.

No. 75–537. TOUCHE ROSS & CO. ET AL. *v.* FABRIKANT ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–551. BUTLER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 55 Ala. App. 421, 316 So. 2d 348.

No. 75–5074. HARKINS *v.* BOMERITO ET AL. C. A. 8th Cir. Certiorari denied.

No. 75–5177. SHELTON *v.* UNITED STATES;
No. 75–5184. WHITE *v.* UNITED STATES; and
No. 75–5245. MCWHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 590 and 591.

No. 75–5213. OWENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 515 F. 2d 507.

No. 75–5243. STEPHENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5253. HUDSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5330. GRIMES ET AL. *v.* UNITED STATES; and
No. 75–5336. LEWIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 528 F. 2d 143.

No. 75–5265. DAVIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 518 F. 2d 81.

No. 75–5291. WEST *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5294. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 384.

No. 75–5341. GRIFFITH (CASTILLO) *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–5346. SHIELDS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 302, 515 F. 2d 1019.

No. 75–5353. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5363. BOWSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5373. DOBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1401.

No. 75–5383. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 336 A. 2d 535.

No. 75–5385. RAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5399. STRATTON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 75–5420. ROOTS *v.* WOODALL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5434. STOVER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5436. HILL *v.* NORTH AMERICAN HIDE EXPORTERS, INC. C. A. 5th Cir. Certiorari denied.

No. 75–5440. STRAND *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 711.

No. 75–5448. LEONARD ET AL. *v.* MISSISSIPPI STATE PROBATION AND PAROLE BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 820.

No. 75–5450. CURRY *v.* JENSEN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 387.

No. 75–5455. DONNELLY ET AL. *v.* DONNELLY ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 515 F. 2d 129.

No. 75–5465. LEWIS *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 896.

No. 75–5475. COX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1401.

No. 75–5476. TARAS *v.* FIRST ARLINGTON NATIONAL BANK. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 636.

No. 75–5479. KLEIN *v.* BUTLER, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5480. HILTON *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5489. STEVENSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 1015, 372 N. Y. S. 2d 994.

No. 75–5495. PUSTARE *v.* HAVENER, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–5501. WILLS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 61 Ill. 2d 105, 330 N. E. 2d 505.

No. 75–5512. ABINA *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75–5513. EPPS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 343, 334 N. E. 2d 566.

No. 75–5515. SHEARS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 75–5518. PATTERSON *v.* AULT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5521. BALL *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 75–5524. ROBINSON *v.* TURNELLO, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5528. HELTZEL *v.* COWAN, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 518 F. 2d 851.

No. 75–5530. MORENO *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5534. BOWES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 75–223. PENNSYLVANIA *v.* JACKSON ET AL. Sup. Ct. Pa. Certiorari denied, it appearing that the judgment below rests on adequate state grounds. Reported below: 461 Pa. 632, 337 A. 2d 582.

No. 75–5536. WASHINGTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5539. CURRIER *v.* CITY OF PASADENA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 48 Cal. App. 3d 810, 121 Cal. Rptr. 913.

No. 75–5554. BEATTY *v.* ALSTON, WORKHOUSE SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 2d 126, 330 N. E. 2d 921.

No. 75–5566. WHITEHOUSE *v.* DERAMUS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1400.

No. 75–350. PACIFIC LIGHTING SERVICE CO. ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 9th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 718.

No. 75–359. CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION. C. A. 9th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 718.

No. 75–403. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 853.

No. 75–432. GRECO *v.* ORANGE MEMORIAL HOSPITAL CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 873.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case presents the question whether a private hospital largely funded by the State and Federal Govern-

ments, partly controlled by the state government and the policymaking body of which is chosen by members of the community may, consistent with the Constitution, refuse to perform elective abortions. In unanimously answering the question in the affirmative, different members of the court below employed two distinct lines of analysis, each of which squarely conflicts with the rule of law existing in other Circuits. The question is important, the conflict is clear, and this Court has a responsibility to resolve it.

Petitioner is a doctor who had staff privileges at the respondent hospital at times relevant to this lawsuit.[1] The hospital had been built by the Orange County, Tex., government with local government money and with federal money obtained by Orange County under the Hill-Burton Act. 60 Stat. 1040, § 605, as added, 78 Stat. 453, and amended, 42 U. S. C. § 291e. The hospital and the land under it were owned by Orange County. However, in 1957, Orange County leased the hospital and the land under it for $1 per year to the respondent, Orange County Memorial Hospital Corp. (Corporation), a nonprofit tax-exempt corporation. Under the lease the Corporation agreed: (1) to operate the hospital as a nonprofit institution and to furnish to the general public medical and surgical care subject to such terms and regulations as the Corporation might prescribe; (2) to carry out the assurances required of the county in order to obtain federal funds and to relinquish possession of the hospital in the event it failed adequately to comply; (3) to have all equipment and

[1] Respondents point out that petitioner ceased his relationship with the hospital after the filing of the instant lawsuit and claim that the case therefore became moot. However this may be with respect to petitioner's injunctive and declaratory claims, his suit for damages is plainly still alive.

supplies inventoried, in a manner approved by the county, and to dispose of worthless, damaged, or worn-out equipment only with the prior approval of the Commissioners Court; (4) to be responsible for the expense of the day-to-day operation and maintenance of the hospital; (5) to make additions to the hospital with the written consent of the county and at its own expense; (6) to keep all appropriate insurance in effect; (7) to submit an annual audit to the county and to furnish any information which the county felt would be necessary to inform the people of Orange County about the operation and financial condition of the institution; (8) to accept indigent patients certified by the Corporation subject to the prior obligation to receive emergency cases. Orange County has reserved the right through its County Health Office to advise the Corporation that an indigent is being kept in the hospital for a longer period of time than necessary. The lease specifically indicates that the Corporation "has undertaken to relieve [the county] of the responsibility and expense of operating a hospital."

The policy of the hospital is, as a result of the lease to the Corporation, set by the Corporation's Board of Directors which consists of nine members. Five are drawn from "life members"—consisting of all people who have contributed $1,000 or more to the Corporation—and four are elected by "advisory-members"—consisting of any Orange County property owner who attends Corporation meetings.

The Board of Directors, on recommendation of the medical staff, adopted in early 1973 a policy against the performance of "elective" abortions at the hospital. As a result, petitioner was unable to accommodate patients who sought his services for that purpose. Petitioner then brought suit under 42 U. S. C. § 1983 against, *inter*

alia, the Corporation, its Board of Directors, and the County Commissioners of Orange County, seeking damages and injunctive relief Petitioner claimed that the actions of the respondents were unconstitutional in that they interfered with the liberty of a woman to choose whether or not to bear a child, in violation of the Fourteenth Amendment, as construed in *Roe* v. *Wade,* 410 U. S. 113 (1973), and also interfered with his right to practice his profession free from unconstitutional interference.[2]

The District Court dismissed petitioner's complaint essentially on the ground that the Board of Directors of the Corporation is a nongovernmental body and that the state instrumentality, *i. e.,* Orange County, was not responsible for the Board's decision not to give elective abortions. Absent such responsibility, respondents' conduct is not unconstitutional.

A panel of the Court of Appeals for the Fifth Circuit also concluded that respondents had not acted in viola-

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[2] Respondents claim that *Roe* v. *Wade,* and *Doe* v. *Bolton,* 410 U. S. 179 (1973), recognize a constitutional right in the abortion decision of the woman seeking the abortion and not in the doctor; and argue that a doctor has no standing to litigate the interests of the pregnant woman except when he is the defendant in a criminal case. This argument was rejected by both courts below as being inconsistent with this Court's decision to extend standing to doctors in *Doe* v. *Bolton, supra,* at 188–189, who had been plaintiffs below and not defendants in a criminal case. Accord: *Wulff* v. *Singleton,* 508 F. 2d 1211 (CA8 1974), cert. granted, 422 U. S. 1041 (1975); *Nyberg* v. *City of Virginia,* 495 F. 2d 1342 (CA8 1974) (podiatrist); *Shaw* v. *Hospital Authority of Cobb County,* 507 F. 2d 625 (CA5 1975); *YWCA* v. *Kugler,* 342 F. Supp. 1048, 1055 (NJ 1972). In light of the fact that this Court will decide in *Wulff* v. *Singleton, supra,* the standing issue presented in this case, an outright denial of this petition can be justified only by a conclusion that the other issues decided below do not merit review.

tion of the Constitution. Two members of the panel agreed with the District Court and stated that the respondents had not acted in an unconstitutional manner because the "State" was not responsible for the Board of Directors' decisions. This conclusion is squarely in conflict with the law of two other Circuits. In *O'Neill* v. *Grayson County War Memorial Hospital,* 472 F. 2d 1140 (1973), the Sixth Circuit held a hospital to be an instrumentality of the State, the conduct of which is governed by the same constitutional limitations as the State's, on facts virtually identical to those involved here. In *O'Neill,* hospital facilities were owned by the county and leased to a foundation for the sum of $1 per year. The foundation agreed to fulfill all duties and responsibilities incident to the maintenance and operation of the hospital and agreed to assume the obligations and agreements that the county governing body had made with the United States in securing Hill-Burton funds. Similarly, the governing body of the hospital was to contain some members selected from the communities served by the hospital. The only fact even mentioned in the *O'Neill* opinion which is not mentioned in the opinion below is that there the nonprofit corporation was, in the event that it ceased to function, to pay to the local government any unused contributions. The provision, which would come into play only in the very unlikely event that the nonprofit corporation ceased to exist for other than financial reasons, can hardly explain the different result in that case. The decision in *O'Neill* conflicts with the decision in this case. The conclusion of the two judges below is also in conflict with the rule in the Fourth Circuit that a hospital is a governmental instrumentality solely by reason of receipt of Hill-Burton funds and the hospital's consequent legal obligations. *Christhilf* v. *Annapolis*

Emergency Hospital Assn., Inc., 496 F. 2d 174 (1974); *Sams* v. *Ohio Valley General Hospital Assn.*, 413 F. 2d 826 (1969); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (1963). Contra: *Watkins* v. *Mercy Medical Center*, 520 F. 2d 894 (CA9 1975); *Ascherman* v. *Presbyterian Hospital of Pacific Med. Ctr., Inc.*, 507 F. 2d 1103 (CA9 1974); *Doe* v. *Bellin Memorial Hospital*, 479 F. 2d 756 (CA7 1973); *Ward* v. *St. Anthony Hospital*, 476 F. 2d 671 (CA10 1973); *Jackson* v. *Norton-Children's Hospitals, Inc.*, 487 F. 2d 502 (CA6 1973).

The third member of the panel below also concluded that the respondents had engaged in no unconstitutional conduct. He stated that the *State* may properly choose to fund operations by paying for the hospital in which they are performed, without permitting the hospital to be used for any particular type of operation. This conclusion is squarely contrary to the decisions of two Circuits, *Doe* v. *Poelker*, 515 F. 2d 541 (CA8 1975); *Nyberg* v. *City of Virginia*, 495 F. 2d 1342 (CA8 1974); and *Doe* v. *Hale Hospital*, 500 F. 2d 144 (CA1 1974); and contrary in principle to the law in several others. *Doe* v. *Rose*, 499 F. 2d 1112 (CA10 1974); *Wulff* v. *Singleton*, 508 F. 2d 1211 (CA8 1974), cert. granted, 422 U. S. 1041 (1975); *Doe* v. *Mundy*, 514 F. 2d 1179 (CA7 1975); see also *Roe* v. *Norton*, 380 F. Supp. 726 (Conn. 1974); *Doe* v. *Wohlgemuth*, 376 F. Supp. 173 (WD Pa. 1974); *Doe* v. *Rampton*, 366 F. Supp. 189 (Utah 1973); *Klein* v. *Nassau County Medical Center*, 347 F. Supp. 496 (EDNY 1972); *Doe* v. *Westby*, 383 F. Supp. 1143 (SD 1974), vacated and remanded, 420 U. S. 968 (1975); and cf. *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701 (CA1 1973).

It is apparent that on either theory adopted by the members of the court below to support its conclusion that the respondents had not acted in violation of the

Constitution, there is a conflict with the law in other Circuits. Whether or not the Court agrees with the result reached below, the conflicts are square; they are on issues which arise with frequency in the lower federal courts; and they are on significant questions of law. Perhaps, in light of the current pressures on our docket, there may be a category of conflicts, involving insignificant points of federal law, which we simply do not have the capacity to resolve. However, it would undoubtedly surprise members of the bar and the public that this Court views the conflicts created by the decision below to fall within such a category.

The task of policing this Court's decisions in *Roe* v. *Wade*, 410 U. S. 113 (1973), and *Doe* v. *Bolton*, 410 U. S. 179 (1973), is a difficult one; but having exercised its power as it did, the Court has a responsibility to resolve the problems arising in the wake of those decisions. I would grant the petition for a writ of certiorari and set this case for oral argument.

No. 74–495. SUSI ET AL. *v.* FLOWERS, JUDGE. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 2d 11, 330 N. E. 2d 662.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Petitioners were arrested on August 31, 1971, and charged with permitting a room to be used for gambling, a misdemeanor, Ohio Rev. Code Ann. § 2915.01 (Supp. 1972), and with possession of numbers game tickets, a felony, Ohio Rev. Code Ann. § 2915.111 (Supp. 1972). On March 6, 1972, petitioners were tried and convicted of the first charge in the Municipal Court of Franklin County, Ohio. They were subsequently indicted on the felony charge in the Court of Common Pleas of Franklin County, and they filed a motion to

dismiss the indictment as violative of double jeopardy based on the previous conviction for a misdemeanor arising out of the same criminal episode. The trial court overruled the motion to dismiss, and the Court of Appeals dismissed petitioners' complaint seeking habeas corpus. *In re Susi,* 38 Ohio App. 2d 73, 313 N. E. 2d 422 (1973). The same court then dismissed petitioners' motion for a writ of prohibition, and this dismissal was affirmed on appeal by the Ohio Supreme Court. *State ex rel. Susi* v. *Flowers,* 43 Ohio St. 2d 11, 330 N. E. 2d 662 (1975).

Thus, the State seeks to try petitioners on two charges in separate trials, although the charges clearly arose out of the same criminal transaction or episode. In that circumstance, we should grant the petition for certiorari and reverse the denial of petitioners' complaint seeking a writ of prohibition. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the joinder at one trial, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Vardas* v. *Texas, ante,* p. 904 (BRENNAN, J., dissenting); *Stewart* v. *Iowa, ante,* p. 902 (BRENNAN, J., dissenting); *Waugh* v. *Gray,* 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri,* 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson,* 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico,* 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States,* 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (concurring statement of Doug-

las, BRENNAN, and MARSHALL, JJ.,); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White*, 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown*, 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana*, 452 Pa. 233, 304 A. 2d 432 (1973), vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory*, 66 N. J. 510, 333 A. 2d 257 (1975).

Rehearing Denied

No. 74–1410. ROBERTS ET AL. *v.* UNITED STATES, *ante*, p. 829;

No. 74–1548. OLD TOWN YACHT BASIN, INC. *v.* CITY OF ALEXANDRIA, *ante*, p. 836;

No. 74–1585. B. COLEMAN CORP. *v.* 47TH & STATE CURRENCY EXCHANGE, INC., *ante*, p. 806;

No. 74–6336. WARNER *v.* UNITED STATES, *ante*, p. 843;

No. 74–6588. COZZETTI *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA ET AL., *ante*, p. 818;

No. 74–6651. LYNCH *v.* UNITED STATES, *ante*, p. 852; and

No. 75–45. TANG ET AL. *v.* CRAVER ET AL., *ante*, p. 865. Petitions for rehearing denied.

No. 74–1573. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ISLAND CREEK COAL CO., *ante*, p. 877. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

DECEMBER 2, 1975

Dismissal Under Rule 60

No. 75–513. DOOLITTLE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Petition for writ of certiorari dismissed as to petitioner Baxter under this Court's Rule 60.

DECEMBER 8, 1975

Dismissal Under Rule 60

No. 75–5751. MEYERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 60.

Affirmed on Appeal

No. 75–280. WASHUM ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. Ariz.

No. 75–348. CLEMONS ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. S. D. Ohio. Motion of American Physical Therapy Assn. for leave to file a brief as *amicus curiae* granted. Judgment affirmed.

No. 75–582. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* BEATTY ET AL., JUDGES. Affirmed on appeal from D. C. S. D. Ill. Reported below: 400 F. Supp. 234.

Appeals Dismissed

No. 75–299. NATIONAL GYPSUM CO. *v.* ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL. Appeal from Sup. Ct. La. dismissed for want of properly presented federal question. Reported below: 313 So. 2d 230.

No. 75–519. JAMIESON *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 7th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 519 F. 2d 1405.

No. 75–5571. PEREZ ET AL. *v.* BATEMAN, COMMISSIONER, DEPARTMENT OF COMMUNITY AFFAIRS OF MASSACHUSETTS, ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 331 N. E. 2d 801.

No. 75–542. YONKERS COMMUNITY DEVELOPMENT AGENCY *v.* MORRIS ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 37 N. Y. 2d 478, 335 N. E. 2d 327.

No. 75–5593. OGROD, AKA OGRODNICKI *v.* OGROD, AKA OGRODNICKI. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question.

Miscellaneous Orders

No. A–426. NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE. On November 21, 1975, applicants filed a motion with the full Court to vacate in part MR. JUSTICE BLACKMUN's stay order filed herein on November 20, 1975. Inasmuch as the order of November 20 was directed solely to the order dated October 27, 1975, of the District Court of Lincoln County, Neb., and by its terms was subject to such action as might subsequently be taken by the Supreme Court of Nebraska, and inasmuch as the Supreme Court of Nebraska on December 1 issued its order in the matter and MR. JUSTICE BLACKMUN's order has thereby expired and is no longer effective, applicants' motion is denied. Denial of this application is without prejudice to the Court's consideration of the applicants' further application for stays and for other relief filed with this Court on December 4, 1975, and presently pending. [See No. A–513, *infra*.]

No. A–455. BROWN *v.* UNITED STATES. C. A. 6th Cir. Application for bail pending appeal, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–466. STEEL ET AL. *v.* FINE ET AL. Application for writ of habeas corpus and all other relief, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. A–495. RATCLIFF *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS. Application for leave to file petition for writ of mandamus, presented to MR. JUSTICE POWELL, and by him referred to the Court, denied.

No. A–513. NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE. Motion to treat previously filed papers as a petition for writ of certiorari to the Supreme Court of Nebraska granted; consideration of said petition for writ of certiorari is deferred until requested responses thereto have been received or until the close of business Tuesday, December 9, 1975. Consideration of application for stay of judgment of the Supreme Court of Nebraska, entered December 1, 1975, deferred pending further order of the Court. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant the application. [See No. A–426, *supra*.]

No. 54, Orig. UNITED STATES *v.* FLORIDA ET AL. It is ordered that the Honorable Olin Hatfield Chilson, Senior Judge for the United States District Court for the District of Colorado, be appointed Special Master in place of the Honorable Charles L. Powell, deceased.

The Special Master shall have authority to fix the time and conditions for filing of additional pleadings and to direct subsequent proceedings, and authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses, the allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his reports, and all other proper expenses shall be

charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master becomes vacant during the recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

The motion of the defendants for leave to file a counterclaim is referred to the Special Master. [For earlier orders herein, see, *e. g.*, 408 U. S. 918.]

No. 74–1452. HOSPITAL BUILDING CO. *v.* TRUSTEES OF REX HOSPITAL ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 820.] Motion of Federation of American Hospitals for leave to file a brief as *amicus curiae* granted.

No. 74–1492. WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 820.] Motion of American Society for Personnel Administration for leave to file a brief as *amicus curiae* granted.

No. 75–19. UNITED STATES *v.* SANTANA ET AL. C. A. 3d Cir. [Certiorari granted, *ante*, p. 890.] Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as *amici curiae* granted.

No. 74–76. SOUTH DAKOTA *v.* OPPERMAN. Sup. Ct. S. D. [Certiorari granted, *ante*, p. 923.] Motion for appointment of counsel granted, and it is ordered that Robert C. Ulrich, Esquire, of Vermillion, S. D., is appointed to serve as counsel for respondent in this case.

No. 75–246. UNITED STATES *v.* HOPKINS. Ct. Cl. [Certiorari granted, *ante*, p. 821.] Motion to substitute Alice R. Hopkins in place of Roy C. Hopkins, deceased, as party respondent granted.

No. 75–169. OMAHA TRIBE OF INDIANS ET AL. *v.* PETERS ET AL. C. A. 8th Cir. Motion to grant petition for writ of certiorari and to consolidate for oral argument with No. 75–5027, *Bryan* v. *Itasca County, Minnesota,* [certiorari granted, *ante,* p. 923], denied. Reported below: 516 F. 2d 133.

No. 75–709. BEAL, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. *v.* FRANKLIN ET AL.; and

No. 75–772. FRANKLIN ET AL. *v.* FITZPATRICK, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, ET AL. Appeals from D. C. E. D. Pa. Motions to expedite and to consolidate with No. 74–1151, *Planned Parenthood of Central Missouri* v. *Danforth;* and No. 74–1419, *Danforth* v. *Planned Parenthood of Central Missouri* [probable jurisdiction noted, *ante,* p. 819], denied.

No. 75–5454. STRATTON *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted

No. 75–252. MEACHUM, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* FANO ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 74–520, *Montanye* v. *Haymes* [certiorari granted, 422 U. S. 1055]. Reported below: 520 F. 2d 374.

No. 75–510. FLINT RIDGE DEVELOPMENT CO. *v.* SCENIC RIVERS ASSOCIATION OF OKLAHOMA ET AL.; and

No. 75–545. HILLS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. *v.* SCENIC RIVERS ASSOCIATION OF OKLAHOMA ET AL. C. A. 10th Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 520 F. 2d 240.

Certiorari Denied. (See also No. 75–519, *supra.*)

No. 74–6716. ASHTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 25 Ill. App. 3d 172, 323 N. E. 2d 133.

No. 75–31. WRIGHT, WARDEN, ET AL. *v.* JOHNSON. C. A. 5th Cir. Certiorari denied. Reported below: 509 F. 2d 828.

No. 75–190. HALL *v.* VIRGINIA. Cir. Ct., Albemarle County, Va. Certiorari denied.

No. 75–285. BARNETT *v.* UNITED STATES; and
No. 75–5339. THOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 811.

No. 75–294. WESTBULK ET AL. *v.* CARIBE SHIPPING CO., INC. C. A. 1st Cir. Certiorari denied. Reported below: 514 F. 2d 1214.

No. 75–307. KUTA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 947.

No. 75–308. TARQUENO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1402.

No. 75–309. ALIOTO, MAYOR OF SAN FRANCISCO, ET AL. *v.* WESTERN ADDITION COMMUNITY ORGANIZATION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 542.

No. 75–313. MAZZEI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 639.

No. 75–322. VERNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 383.

No. 75–335. HALPENNY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–338. SERVANTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1402.

No. 75–351. CALLAHAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 515 F. 2d 511.

No. 75–352. DiSILVIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 520 F. 2d 247.

No. 75–357. ALOI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 511 F. 2d 585.

No. 75–358. TROISE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1182.

No. 75–379. POMPONIO ET AL. *v.* UNITED STATES; and
No. 75–413. POMPONIO *v.* UNITED STATES. C: A. 4th Cir. Certiorari denied. Reported below: 517 F. 2d 460.

No. 75–386. ROCKWELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 512 F. 2d 882.

No. 75–389. STRONG ET AL. *v.* UNITED STATES;
No. 75–438. POTTAWATOMIE TRIBE OF INDIANS ET AL. *v.* UNITED STATES; and
No. 75–458. HANNAHVILLE INDIAN COMMUNITY ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 554, 518 F. 2d 556.

No. 75–396. HOME SAVINGS & LOAN ASSN. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 514 F. 2d 1199.

No. 75–401. CHAPIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 303, 515 F. 2d 1274.

No. 75–400. DI NOVO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 523 F. 2d 197.

No. 75–419. BRAHANEY DRILLING CO. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 270.

No. 75–433. KENDRICK ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 842.

No. 75–456. SIOUX NATION OF INDIANS ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 234, 518 F. 2d 1298.

No. 75–475. SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 206 Ct. Cl. 897, 521 F. 2d 1405.

No. 75–530. BROWN *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th & 10th Jud. Dists. Certiorari denied.

No 75–533. SCHUMACKER ET AL. *v.* PEIRCE JUNIOR COLLEGE. Pa. Commw. Ct. Certiorari denied. Reported below: 17 Pa. Commw. 604, 333 A. 2d 510.

No. 75–534. CHURCH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 317 So. 2d 386.

No. 75–544. PAXTON ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 2d 923.

No. 75–548. POSNER *v.* BAR ASSOCIATION OF BALTIMORE CITY. Ct. App. Md. Certiorari denied. Reported below: 275 Md. 250, 339 A. 2d 657.

No. 75–549. KOTAKIS *v.* ELGIN, JOLIET & EASTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. Reported below: 520 F. 2d 570.

No. 75-550. WILSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 258 Ark. 110, 522 S. W. 2d 413.

No. 75-553. BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AFL-CIO *v.* REA EXPRESS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 164.

No. 75-555. COURT REPORTERS OF DADE COUNTY *v.* CIRCUIT JUDGES FOR THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 314 So. 2d 782.

No. 75-556. COCKE *v.* JAMES STEWART CO. ET AL. Ct. App. Ariz. Certiorari denied.

No. 75-560. BURNS *v.* DECKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 1404.

No. 75-563. SANTOS *v.* PENNSYLVANIA; and

No. 75-564. RICHARD, AKA HARRIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 233 Pa. Super. 254, 336 A. 2d 423.

No. 75-569. ALLIED CONTRACTORS, INC. *v.* TOWN OF FEDERALSBURG. Ct. App. Md. Certiorari denied. Reported below: 275 Md. 151, 338 A. 2d 275.

No. 75-572. ADKINS *v.* UNDERWOOD ET AL., JUDGES. C. A. 7th Cir. Certiorari denied. Reported below: 520 F. 2d 890.

No. 75-578. MOLONEY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 491.

No. 75-583. DOCKING ET AL. *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 217 Kan. 756, 539 P. 2d 329.

No. 75–586. UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA, ET AL. *v.* LOUISIANA THROUGH THE DEPARTMENT OF HIGHWAYS. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 313 So. 2d 886.

No. 75–587. PHILIP B. BASSER ADVERTISING, INC., ET AL. *v.* REDEVELOPMENT AUTHORITY OF THE CITY OF PHILADELPHIA. Pa. Commw. Ct. Certiorari denied. Reported below: 19 Pa. Commw. 272, 339 A. 2d 885.

No. 75–596. BERSCH *v.* ARTHUR ANDERSEN & CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 974.

No. 75–597. REHOR *v.* CASE WESTERN RESERVE UNIVERSITY. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 2d 224, 331 N. E. 2d 416.

No. 75–615. CONSUMER ENTERPRISES, INC. *v.* NATIONAL FOOTBALL LEAGUE PROPERTIES, INC. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 26 Ill. App. 3d 814, 327 N. E. 2d 242.

No. 75–5087. FLUM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 39.

No. 75–5118. ROSS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 522 S. W. 2d 214.

No. 75–5154. SAM *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 310 So. 2d 923.

No. 75–5158. PRESTAGE *v.* REED, PENITENTIARY SUPERINTENDENT. C. A. 5th Cir. Certiorari denied.

No. 75–5163. SHURNEY *v.* GRAY, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 506 F. 2d 1400.

No. 75–5166. YOUNGBEAR *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 229 N. W. 2d 728.

No. 75–5176. HICKS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 75–5181. BELL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 311 So. 2d 104.

No. 75–5193. DOBBINS *v.* DOBBINS. Sup. Ct. Ga. Certiorari denied. Reported below: 234 Ga. 347, 216 S. E. 2d 102.

No. 75–5197. KALLIE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 588.

No. 75–5205. DAVIS *v.* VIRGINIA. Cir. Ct., Lynchburg, Va. Certiorari denied.

No. 75–5225. BALLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 463.

No. 75–5267. BORUSKI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5270. BORUSKI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–5275. DAVIS *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 462 Pa. 27, 336 A. 2d 888.

No. 75 5277. RIVERA *v.* UNITED STATES; and
No. 75–5378. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 723.

No. 75–5283. PETERS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 314 So. 2d 724.

No. 75–5300. REED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 F. 2d 624.

No. 75–5368. TUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5332. Cox, Administratrix *v.* Dravo Corp. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 620.

No. 75–5337. Zektzer *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 13 Wash. App. 24, 533 P. 2d 399.

No. 75–5348. Lazur *v.* Broad Mountain Club, Inc. Sup. Ct. Pa. Certiorari denied. Reported below: 461 Pa. 668, 337 A. 2d 599.

No. 75–5357. Rusk, aka Thor *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 815.

No. 75–5369. Phillips *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 522 F. 2d 606.

No. 75–5374. Harris *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1272.

No. 75–5396. Blevins *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–5411. Johnson *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 92.

No. 75–5418. Hailey *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 75–5422. Fortune *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 883.

No. 75–5443. Garcia *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 75–5447. Mistie *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1400.

No. 75–5445. SAULS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 520 F. 2d 568.

No. 75–5461. CONNOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5467. EATON *v.* DYER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 1404.

No. 75–5471. BORUSKI *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5478. KELTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 531.

No. 75–5485. DOZIER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 522 F. 2d 224.

No. 75–5494. VON KRONENBERGER *v.* CALIFORNIA; and

No. 75–5516. PRILEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5498. COVERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5500. POULOS *v.* UNITED STATES;

No. 75–5503. MCEARCHERN ET AL. *v.* UNITED STATES; and

No. 75–5522. MARRIFIELD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 877.

No. 75–5517. KWIATKOWSKI ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 75–5533. STROUP *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 75–5537. JOHN *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5466. PHILLIPS *v.* PHILLIPS. Ct. App. Mass. Certiorari denied. Reported below: —— Mass. App. ——, 326 N. E. 2d 729.

No. 75–5540. WOODS *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1406.

No. 75–5544. LAGRONE *v.* MCBRIDE ET AL. C. A. 10th Cir. Certiorari denied.

No. 75–5558. ROY *v.* DUNN. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 224, 521 F. 2d 324.

No. 75–5560. SADLER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1401.

No. 75–5561. BRANTLEY *v.* ADAMS, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5563. JONES *v.* GATHRIGHT, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 529 F. 2d 515.

No. 75–5564. MOORE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5565. PAYTON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN. C. A. 7th Cir. Certiorari denied.

No. 75–5567. JORDAN *v.* JOHNSON, CORRECTIONS DIRECTOR, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1401.

No. 75–5574. MCLEAN *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 75–5576. WINFORD *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 1114.

No. 75–5578. SMITH *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Alameda County. Certiorari denied.

No. 75–5579. HAMMOND *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5580. DOESCHER *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 75–5582. CURTIS *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 717.

No. 75–5583. ZAVALA *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5587. HECKSTALL *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 75–5595. TUBBS *v.* HENDERSON, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 318 So. 2d 43.

No. 75–5600. WILLIAMS *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 519 F. 2d 1398.

No. 75–5603. AREY *v.* MARYLAND. Ct. App. Md. Certiorari denied.

No. 75–5605. MABRA *v.* GRAY. C. A. 7th Cir. Certiorari denied. Reported below: 518 F. 2d 512.

No. 75–5613. FAIR *v.* SULLIVAN, SUPERVISOR OF ELECTIONS. C. A. 5th Cir. Certiorari denied.

No. 75–5615. STEERE *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–5617. MATTHEWS ET UX. *v.* YALE-NEW HAVEN HOSPITAL. App. Div., Conn. Ct. Common Pleas. Certiorari denied. Reported below: 32 Conn. Supp. 539, 343 A. 2d 661.

No. 75–5620. SCULLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5621. ENBINDER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 330 N. E. 2d 846.

No. 75–5623. BANDA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1057.

No. 75–5625. STEWART *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5627. OLTIVEROS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 478.

No. 75–5630. DIXON *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–5631. KENARD *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 88 N. M. 107, 537 P. 2d 1003.

No. 75–5636. SMITH *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., Alameda County. Certiorari denied.

No. 75–5651. CRAVENS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 75–102. MCELROY ET UX. *v.* TAYLOR. Ct. App. Tenn. Motion of Holt Adoption Program, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 522 S. W. 2d 345.

No. 75–5665. VLAHAKIS *v.* ILLINOIS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 75–5755. WHITE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 169 Conn. 223, 363 A. 2d 143.

No. 75–317. WOESTENDIEK ET AL. *v.* WALKER ET UX. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: —— Colo. ——, 538 P. 2d 450.

No. 75–415. PORTLAND CEMENT ASSN. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. D. C. Cir. Motion of National Association of Manufacturers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 168 U. S. App. D. C. 248, 513 F. 2d 506.

No. 75–573. ZWEIG ET AL. *v.* HEARST CORP. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE WHITE would grant certiorari. Reported below: 521 F. 2d 1129.

No. 75–5263. LUJAN *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 87 N. M. 400, 534 P. 2d 1112.

No. 75–5750. RAITPORT *v.* GENERAL MOTORS CORP. ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

Rehearing Denied

No. 74–6502. WATKINS *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 924; and

No. 74–6622. SELLARS *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT, *ante*, p. 924. Petitions for rehearing denied.

No. 75-284. METROPOLITAN DADE COUNTY, FLORIDA, ET AL. *v.* AEROJET-GENERAL CORP., *ante*, p. 908;

No. 75–289. SCHULZ *v.* CRESS ET AL., *ante*, p. 913;

No. 75–5081. HOWLETT *v.* FEDERAL NATIONAL MORTGAGE ASSN., *ante*, p. 909;

No. 75–5174. WOOLLEN *v.* WILLIAMS ET AL., *ante*, p. 917;

No. 75–5226. ANTHONY *v.* VINCENT, CORRECTIONAL SUPERINTENDENT, *ante*, p. 934;

No. 75–5413. MORETTA *v.* MORETTA, *ante*, p. 937; and

No. 75–5431. THOMAS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, *ante*, p. 944. Petitions for rehearing denied.

No. 74–1571. SARULLO ET AL. *v.* UNITED STATES, *ante*, p. 837; and

No. 74–6599. GLENN *v.* NEW YORK, *ante*, p. 853. Motions for leave to file petitions for rehearing denied.

Assignment Orders

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit from April 12, 1976, to April 16, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Second Circuit from June 1, 1976, to June 4, 1976, and for such additional time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

DECEMBER 12, 1975

Certiorari Granted

No. 75–817. NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE. Sup. Ct. Neb. Motion of Nebraska Press Assn. et al. for leave to treat their application as a petition for certiorari having been heretofore granted [*ante*, p. 1011], it is ordered:

1. Petition for writ of certiorari granted;

2. Motion to expedite denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant motion.

3. Application for stay denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant application. MR. JUSTICE WHITE would stay judgment of the Nebraska Supreme Court to the extent that its order forbade the publication of information disclosed in public at the preliminary hearing in the criminal case out of which this case arose. In this respect, he is in disagreement with the Court's actions in this case today. He joins the Court in granting the petition for writ of certiorari and in ordering plenary consideration of this case, which as he understands it, raises issues broader than the power of the State to enjoin the publication of facts disclosed at a public hearing in a state court. Being convinced that these questions should be decided only after adequate briefing and argument and ample time for mature consideration, he is in agreement that we should not attempt to hear and decide this case prior to the beginning of the criminal trial in early January.

4. Petitioners Nebraska Press Assn. et al. are invited to file an amended petition for certiorari on or before December 30, 1975. Responses may be made in accord with the Court's Rules.

Reported below: 194 Neb. 783, 236 N. W. 2d 794.

DECEMBER 15, 1975

Appeals Dismissed

No. 75–599. APPALACHIAN POWER CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question. MR. JUSTICE POWELL took no part in the consideration or decision of this appeal.

No. 75–648. MORITT *v.* EXTRAORDINARY SPECIAL AND TRIAL TERM OF THE SUPREME COURT, COUNTY OF KINGS, ET AL. Appeal from App. Div., Sup. Ct. N. Y., 2d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 46 App. Div. 2d 784, 361 N. Y. S. 2d 20.

No. 75–5590. TONEY *v.* ARIZONA. Appeal from Super. Ct. Ariz., Pima County, dismissed for want of substantial federal question.

Miscellaneous Orders

No. A–472. KELLEY *v.* UNITED STATES ET AL. Application for stay of order of the United States District Court for the Central District of California, entered on October 2, 1975, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–512. SEDGWICK *v.* UNITED STATES. Application to recall mandate of the District of Columbia Court of Appeals and to stay its issuance pending filing of petition for writ of certiorari, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 345 A. 2d 465.

No. A–527. KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL. Application for stay of judgment of the

United States District Court for the Eastern District of Pennsylvania, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted.

No. 73–861. EAST CARROLL PARISH SCHOOL BOARD ET AL. *v.* MARSHALL. C. A. 5th Cir. [Certiorari granted, 422 U. S. 1055.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of respondent granted and 15 additional minutes allotted for that purpose. Petitioners allotted 15 additional minutes for oral argument.

No. 74–1589. GENERAL ELECTRIC CO. *v.* GILBERT ET AL.; and

No. 74–1590. GILBERT ET AL. *v.* GENERAL ELECTRIC CO. C. A. 4th Cir. [Certiorari granted, *ante*, p. 822.] Motion of Celanese Corp. for leave to file a brief as *amicus curiae* granted.

No. 75–76. SOUTH DAKOTA *v.* OPPERMAN. Sup. Ct. S. D. [Certiorari granted, *ante*, p. 923.] Motion of the Attorney General of South Dakota to permit Earl R. Mettler, Esquire, to present oral argument *pro hac vice* granted.

No. 75–110. SAKRAIDA *v.* AG PRO, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 891.] Motion of Texas Farmers Union for leave to file a brief as *amicus curiae* granted.

No. 75–122. CANTOR, DBA SELDEN DRUGS CO. *v.* DETROIT EDISON CO. C. A. 6th Cir. [Certiorari granted, *ante*, p. 821.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* in support of petitioner granted and 15 additional minutes allotted for that purpose. Respondent allotted 15 additional minutes for oral argument.

No. 75–527. ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME OF CALIFORNIA *v.* FIVE GILL NETS ET AL. Ct. App. Cal., 1st App. Dist. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–554. BEAL, SECRETARY, DEPARTMENT OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. *v.* DOE ET AL. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–624. JONES, DIRECTOR, DIVISION OF FAMILY SERVICES OF UTAH, ET AL. *v.* T. H. Appeal from D. C. Utah. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–5387. SIFUENTES *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 945.] Motion for appointment of counsel granted, and it is ordered that Ballard Bennett, Esquire, of Weslaco, Tex., be appointed to serve as counsel for petitioner in this case.

No. 75–644. BAKER ET UX. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON; and

No. 75–5591. CHILEMBWE *v.* WANGELIN, JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 75–5596. VIDAL *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. Motion for leave to file petition for writ of mandamus and/or certiorari denied.

Certiorari Granted

No. 75–616. VILLAGE OF ARLINGTON HEIGHTS ET AL. *v.* METROPOLITAN HOUSING DEVELOPMENT CORP. ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 517 F. 2d 409.

No. 74–1263. BREWER, WARDEN *v.* WILLIAMS. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 509 F. 2d 227.

No. 74–6438. SCOTT ET AL. *v.* KENTUCKY PAROLE BOARD ET AL. C. A. 6th Cir. Motion for leave to proceed *in forma pauperis* and certiorari granted.

No. 75–235. G. M. LEASING CORP. ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari granted limited to Question 2 presented by the petition which reads as follows: "Whether tax agents of the United States acted illegally in seizing automobiles and documents in violation of petitioner G. M. Leasing Corporation's Fourth Amendment rights under the Constitution of the United States." Reported below: 514 F. 2d 935.

No. 75–251. FITZPATRICK ET AL. *v.* BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL.; and

No. 75–283. BITZER, CHAIRMAN, STATE EMPLOYEES' RETIREMENT COMMISSION, ET AL. *v.* MATTHEWS ET AL. C. A. 2d Cir. Certiorari granted. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 519 F. 2d 559.

Certiorari Denied. (See also No. 75–648, *supra.*)

No. 74–1233. GREEN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 1062.

No. 74–1367. ROSENBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 515 F. 2d 190.

No. 74–1461. PAY MING LEU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 511 F. 2d 1062.

No. 74–5865. JORGENSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 74–6160. GRIFFIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 327 A. 2d 530.

No. 75–311. JASCOURT *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 75–320. BRANIFF AIRWAYS, INC. *v.* EL PASO COIN CO., INC., ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Certiorari denied. Reported below: 517 S. W. 2d 915.

No. 75–362. CRABTREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–370. SKARTSIVAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1403.

No. 75–371. LEADING FIGHTER ET AL. *v.* COUNTY OF GREGORY. Sup. Ct. S. D. Certiorari denied. Reported below: — S. D. —, 230 N. W. 2d 114.

No. 75–385. MAGGIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 80.

No. 75–390. CRAFT, AKA WOODS, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 564.

No. 75–391. MUCKENSTRUM, AKA BAKER, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 568.

No. 75–392. BURCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–398. GERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 515 F. 2d 145.

No. 75–402. HONEYCUTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1402.

No. 75–406. WUNNICKE ET AL. *v.* UNITED STATES. C. A. 10th Cir Certiorari denied.

No. 75–411. BRANDENFELS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 1259.

No. 75–416. MOSKOWITZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 1406.

No. 75–418. FISHER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 518 F. 2d 836.

No. 75–427. MARTIN ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 1395.

No. 75–446. STERN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 521.

No. 75–463. DIGIRLOMO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 372.

No. 75–484. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 519 F. 2d 595.

No. 75–485. CHAMBER OF COMMERCE OF THE UNITED STATES *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 352.

No. 75–540. BOYLE ET AL. *v.* KLEPPE, SECRETARY OF THE INTERIOR. C. A. 9th Cir. Certiorari denied.

No. 75–531. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–598. SHANNON ET AL. *v.* MORALES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 411.

No. 75–609. MORTON ET AL. *v.* CHARLES COUNTY BOARD OF EDUCATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 520 F. 2d 871.

No. 75–613. METCALF *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 75–626. NOLAN *v.* MEYER ET AL., TRUSTEES. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1276.

No. 75–629. KLINE ET UX. *v.* HEYMAN ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 309 So. 2d 242.

No. 75–5207. ANDERSON *v.* UNITED STATES; and

No. 75–5424. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 517 F. 2d 1405.

No. 75–5254. SKAGGS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 513 F. 2d 634.

No. 75–5340. RIOS-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5359. BOROM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 1405.

No. 75–5393. HANSMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5403. NORMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5419. HAIRRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1264.

No. 75–5470. BURNETT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 1373.

No. 75–5506. JACKMAN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5509. CANTU ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 494.

No. 75–5526. BROGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 28.

No. 75–5542. GOMORI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 522 F. 2d 959.

No. 75–5556. MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 703.

No. 75–5559. HILLSMAN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 522 F. 2d 454.

No. 75–5572. NAVA-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 1129.

No. 75–5597. STRICKLAND *v.* MONROE COUNTY PUBLISHING CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 1401.

No. 75–5602. TAYLOR *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5599. GRIFFITH *v.* ILLINOIS; and

No. 75–5637. LYONS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 26 Ill. App. 3d 193, 324 N. E. 2d 677.

No. 75–5606. HECKSTALL *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 75–5607. BARNES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 518 F. 2d 182.

No. 75–5618. JURGENS *v.* MARBLEY. C. A. 9th Cir. Certiorari denied.

No. 75–5638. VANDYGRIFT *v.* HILLSBOROUGH COUNTY COMMISSIONERS. Sup. Ct. Fla. Certiorari denied.

No. 75–5639. PULIDO-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5641. SAMUELS *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 75–5646. HOVER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 317 So. 2d 748.

No. 75–5648. HARPER *v.* GRAY. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 694.

No. 75–5650. YOSS *v.* SCHUBERT, HOSPITAL SUPERINTENDENT, ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5653. ADAMS *v.* CBI-FAIRMAC CORP. Ct. App. D. C. Certiorari denied.

No. 75–5662. HOWARD *v.* HENDERSON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1176.

No. 75–5666. HARRIS *v.* NEW YORK. Onondaga County Ct. Certiorari denied.

No. 75–5667. MURPHY *v.* BRISCOE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1087.

No. 75–5671. MCLAUGHLIN *v.* VINZANT, CORRECTIONAL SUPERINTENDENT. C. A. 1st Cir. Certiorari denied. Reported below: 522 F. 2d 448.

No. 75–5676. BEAUPRE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 526 S. W. 2d 811.

No. 75–5677. THOMASSEN *v.* BURKHEAD. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 75–5702. RICHARDS *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 510 F. 2d 1406.

No. 75–375. WHITE FARM EQUIPMENT CO. *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 75–558. COMMISSIONER OF INTERNAL REVENUE *v.* AMERADA HESS CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL would grant certiorari in No. 75–375, limited to Question 2 presented in the petition. Reported below: 517 F. 2d 75.

No. 75–453. NATIONAL ALLIANCE OF POSTAL AND FEDERAL EMPLOYEES *v.* KLASSEN, POSTMASTER GENERAL, ET AL. C. A. D. C. Cir. Motion of National Association for the Advancement of Colored People for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 168 U. S. App. D. C. 293, 514 F. 2d 189.

No. 75–691. SHIELDS ET AL. *v.* FRANKLIN ET AL.; and

No. 75–5505. FRANKLIN ET AL. *v.* SHIELDS ET AL. Petition for certiorari before judgment to C. A. 4th Cir. Motion of respondents for leave to proceed *in forma pauperis* in No. 75–691 granted. Certiorari denied. Reported below: See 399 F. Supp. 309.

No. 75–487. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY *v.* ABRAMS. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 521 F. 2d 1094.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE POWELL joins, dissenting.

The Court of Appeals has advanced the novel doctrine that when a federal court acts on a record made in state disciplinary proceedings the federal court's power to discipline a member of its bar is circumscribed by the scope of the penalty imposed by the state courts. It has always seemed clear to me that the federal courts have plenary power over the admission, disbarment, or discipline of attorneys who practice before them. See Cheatham, The Reach of Federal Action Over the Profession of Law, 18 Stan. L. Rev. 1288, 1291–1292 (1966). The federal courts are not bound by the standards of professional conduct prescribed or enforced by the States any more than States are bound by federal action. A federal court may well determine that conduct found tolerable by another jurisdiction merits disbarment in federal court, as our actions disciplining members of this Court's Bar implicitly demonstrate. See, *e. g., In re Disbarment of Osborne,* 420 U. S. 918 (1975); *In re Disbarment of Buttles,* 419 U. S. 1101 (1975); *In re Disbarment of Mades,* 414 U. S. 1154 (1974). A federal court must apply state law in diversity cases, but there is not the slightest reason to do so in judging the conduct of members of its own bar.

I do not share the view that this is a subject not warranting the time for full briefing and argument here. Granting that the burdens of our calendar do not permit full review of all we might desire, the issue here seems so

clear that we could appropriately grant the writ and reverse the judgment summarily.

No. 75–5268. YOUNG *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 234 Ga. 488, 216 S. E. 2d 586.

Rehearing Denied

No. 75–236. KUTLER *v.* UNITED STATES, *ante*, p. 959;

No. 75–258. PARKER *v.* LORENZ, ACTING LIBRARIAN OF CONGRESS, ET AL., *ante*, p. 927;

No. 75–323. IN RE BERRY, *ante*, p. 928;

No. 75–374. WARREN *v.* KILLORY, SUPERINTENDENT OF SCHOOLS, BROCKTON, MASSACHUSETTS, ET AL., *ante*, p. 929;

No. 75–435. CESSNA AIRCRAFT CO. ET AL. *v.* WHITE INDUSTRIES, INC., *ante*, p. 947.

No. 75–5324. GUERRERO *v.* HAUCK, SHERIFF, *ante*, p. 936; and

No. 75–5584. WHITE *v.* ALABAMA, *ante*, p. 951. Petitions for rehearing denied.

No. 74–1574. UNITED MINE WORKERS OF AMERICA ET AL. *v.* ARMCO STEEL CORP. ET AL., *ante*, p. 877. Petition for rehearing denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.

No. 74–6726. ORBIZ, AKA LLACA *v.* UNITED STATES, *ante*, p. 861. Motion for leave to file petition for rehearing denied.

DECEMBER 17, 1975

Dismissal Under Rule 60

No. 74–1549. BAILEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 512 F. 2d 833.

DECEMBER 19, 1975

Miscellaneous Order. (For Court's order making allotment of Justices, see *ante*, p. II.)

DECEMBER 22, 1975

Miscellaneous Order

No. A–550 (75–436 and 75–437). BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from C. A. D. C. Cir.; and

BUCKLEY ET AL. *v.* VALEO, SECRETARY OF THE UNITED STATES SENATE, ET AL. Appeal from D. C. D. C. [Probable jurisdiction noted, *ante*, p. 820.] Application to enjoin appellees from making certification pursuant to 26 U. S. C. § 9036 (a) for payments to finance campaign activities of certain candidates for nomination for election to be President of the United States and from making certification pursuant to 26 U. S. C. § 9008 (g) for payments to finance certain Presidential nominating conventions, pending final disposition of the appeals in this Court, was received by THE CHIEF JUSTICE, December 17, 1975, and, after calling for a response, he presented the said application to the Court.

Upon consideration of the said application for an injunction, and of the opposition thereto filed by the Solicitor General of the United States, December 17, 1975, it is ordered that there being no majority to grant the injunction, the said application is denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST would grant the injunction. MR. JUSTICE STEVENS took no part in the consideration or disposition of this application.

JANUARY 12, 1976

Affirmed on Appeal

No. 75–414. THOMPSON VAN LINES, INC., ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. Reported below: 399 F. Supp. 1131.

No. 75–677. SCHWARTZ, CHAIRMAN, NEW YORK BOARD OF ELECTIONS, ET AL. *v.* VANASCO ET AL. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 401 F. Supp. 87.

No. 75–678. SCHWARTZ, CHAIRMAN, NEW YORK BOARD OF ELECTIONS, ET AL. *v.* POSTEL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 401 F. Supp. 87.

No. 75–520. NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 397 F. Supp. 591.

Appeals Dismissed

No. 75–602. CABOT CORP. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL. Appeal from Sup. Ct. App. W. Va. dismissed for want of substantial federal question.

No. 75–639. GENTILE ET AL. *v.* ALTERMATT ET AL. Appeal from Sup. Ct. Conn. dismissed for want of substantial federal question. Reported below: 169 Conn. 267, 363 A. 2d 1.

No. 75–5715. SWAIN *v.* TENNESSEE. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 527 S. W. 2d 119.

No. 75–717. STUDENTS INTERNATIONAL MEDITATION SOCIETY *v.* HIRAM RICKER & SONS. Appeal from Sup. Jud. Ct. Me. dismissed for want of jurisdiction. Reported below: 342 A. 2d 262.

No. 75–5730. NEAL *v.* HOLLADAY ET AL. Appeal from D. C. N. D. Ga. dismissed for want of jurisdiction.

No. 75–666. COFFEE-RICH, INC., ET AL. *v.* FIELDER, DIRECTOR OF AGRICULTURE OF CALIFORNIA, ET AL. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 48 Cal. App. 3d 990, 122 Cal. Rptr. 302.

No. 75–5738. HARRISON *v.* LOCAL 54, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, AFL–CIO. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 518 F. 2d 1276.

No. 75–5206. ORSINI *v.* BLASI. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 36 N. Y. 2d 568, 331 N. E. 2d 486.

Certiorari Granted—Vacated and Remanded

No. 75–129. SUCHY *v.* UNITED STATES. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further proceedings in which petitioner will be allowed to file a petition for rehearing and in which the court may determine whether further briefing and argument are necessary. Reported below: 513 F. 2d 633.

Miscellaneous Orders

No. A–500. SARULLO *v.* UNITED STATES, *ante*, p. 837. Application to stay further execution and enforcement of judgment of conviction by the United States District Court for the Western District of Tennessee, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–527. KREMENS, HOSPITAL DIRECTOR, ET AL. *v.* BARTLEY ET AL. D. C. E. D. Pa. Motion to vacate in part stay heretofore granted by this Court on December 15, 1975 [*ante*, p. 1028] denied.

No. A–532 (75–522). TALLANT ET AL. *v.* UNITED STATES. D. C. N. D. Ga. Reapplication for bail, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–543. CITIZENS COMMITTEE TO OPPOSE ANNEXATION *v.* CITY OF LYNCHBURG, VIRGINIA, ET AL. C. A. 4th Cir. Application for injunction, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 528 F. 2d 816.

No. A–597. FRANKS *v.* FRANKS. Application for stay of mandate of Supreme Court of Colorado, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: —— Colo. ——, 542 P. 2d 845.

No. 74–220. HANCOCK, ATTORNEY GENERAL OF KENTUCKY *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. C. A. 6th Cir. [Certiorari granted, 420 U. S. 971.] Motion of the State of Alabama for leave to file a brief as *amicus curiae* granted.

No. 73–7031. FOWLER *v.* NORTH CAROLINA. Sup. Ct. N. C. [Restored to calendar, 422 U. S. 1039.] Motion

of the Attorney General of California for leave to participate in oral argument as *amicus curiae* denied. Motion of American Ethical Union et al. for leave to file a brief as *amici curiae* granted.

No. 74–1151. PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL.; and

No. 74–1419. DANFORTH, ATTORNEY GENERAL OF MISSOURI *v.* PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. Appeals from D. C. E. D. Mo. [Probable jurisdiction noted, *ante*, p. 819.] Motion of Lawyers for Life, Inc., et al. for leave to file a brief as *amici curiae* granted. Motions of D. C. Right of Life Committee (Wash., D. C.) et al., and Dr. Eugene Diamond et al. for leave to file briefs as *amici curiae* denied.

No. 74–1263. BREWER, WARDEN *v.* WILLIAMS. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1031.] Motion for appointment of counsel granted, and it is ordered that Robert Bartels, Esquire, of Iowa City, Iowa, be appointed to serve as counsel for respondent in this case.

No. 74–1318. DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motion of respondents for leave to proceed further herein *in forma pauperis* denied.

No. 74–1492. WASHINGTON, MAYOR OF WASHINGTON, D. C., ET AL. *v.* DAVIS ET AL. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 820.] Motion of Educational Testing Service for leave to file a brief as *amicus curiae* granted. Motion of Executive Committee of the Division of Industrial Organizational Psychology (Div. 14) of the American Psychological Assn. for leave to file a brief as *amicus curiae* granted and request to participate in oral argument denied.

No. 74–1487. UNITED STATES *v.* MACCOLLOM. C. A. 9th Cir. [Certiorari granted, *ante*, p. 821.] Motion for appointment of counsel granted, and it is ordered that John A. Strait, Esquire, of Seattle, Wash., be appointed to serve as counsel for respondent in this case.

No. 74–1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 821.] Motion of Coalition for the Environment, St. Louis Region, for leave to file a brief as *amicus curiae* granted.

No. 74–1563. CITY OF EASTLAKE ET AL. *v.* FOREST CITY ENTERPRISES, INC. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 890.] Motion of San Diego Building Contractors Assn. et al. for leave to file a brief as *amici curiae* granted.

No. 74–1646. ANDRESEN *v.* MARYLAND. Ct. Sp. App. Md. [Certiorari granted, *ante*, p. 822.] Motion of the Solicitor General to participate in oral argument as *amicus curiae* in support of respondent granted and 15 additional minutes allotted for that purpose. Petitioner also allotted 15 additional minutes for oral argument.

No. 75–62. RUNYON ET UX. *v.* MCCRARY ET AL.;

No. 75–66. FAIRFAX-BREWSTER SCHOOL, INC. *v.* GONZALES ET UX.;

No. 75–278. SOUTHERN INDEPENDENT SCHOOL ASSN. *v.* MCCRARY ET AL.; and

No. 75–306. MCCRARY ET AL. *v.* RUNYON ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 945.] Motion of Dade Christian Schools, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75–76. SOUTH DAKOTA *v.* OPPERMAN. Sup. Ct. S. D. [Certiorari granted, *ante*, p. 923.] Motion of Americans for Effective Law Enforcement, Inc., for leave to file a brief as *amicus curiae* granted.

No. 75–122. CANTOR, DBA SELDEN DRUGS CO. *v.* DETROIT EDISON CO. C. A. 6th Cir. [Certiorari granted, *ante*, p. 821.] Motions of National Association of Regulatory Utility Commissioners and Michigan Bell Telephone Co. et al. for leave to file briefs as *amici curiae* granted.

No. 75–260. MCDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 923.] Motions of Chamber of Commerce of the United States, American Jewish Committee, and Anti-Defamation League of B'nai B'rith for leave to file briefs as *amici curiae* granted.

No. 75–292. SERBIAN EASTERN ORTHODOX DIOCESE FOR THE UNITED STATES OF AMERICA AND CANADA ET AL. *v.* MILIVOJEVICH ET AL. Sup. Ct. Ill. [Certiorari granted, *ante*, p. 911.] Motion of the Catholic Bishop of Chicago for leave to file a brief as *amicus curiae* granted.

No. 75–312. YOUNG, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL. C. A. 6th Cir. [Certiorari granted, *sub. nom. Gribbs* v. *American Mini Theatres, Inc.*, *ante*, p. 911.] Motion of respondents for additional time for oral argument denied. Alternative request for divided argument granted.

No. 75–377. LUDWIG *v.* MASSACHUSETTS. Appeal from Sup. Jud. Ct. Mass. [Probable jurisdiction noted, *ante*, p. 945.] Motion of appellant for leave to proceed further herein *in forma pauperis* denied.

No. 75–676. BOWMAN TRANSPORTATION, INC. *v.* ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. Appeal from D. C. W. D. Ark. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–562. ROSEBUD SIOUX TRIBE *v.* KNEIP, GOVERNOR OF SOUTH DAKOTA, ET AL. C. A. 8th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 75–681. GRAYSON *v.* WENKE, JUDGE, ET AL.;

No. 75–5553. WILSON *v.* MULLOY, U. S. MAGISTRATE; and

No. 75–5654. JACKSON *v.* STANLEY, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 75–628. CRAIG ET AL. *v.* BOREN, GOVERNOR OF OKLAHOMA, ET AL. Appeal from D. C. W. D. Okla. Probable jurisdiction noted. Reported below: 399 F. Supp. 1304.

Certiorari Granted

No. 75-679. INTERNAL REVENUE SERVICE *v.* FRUEHAUF CORP. ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 522 F. 2d 284.

No. 75–552. KLEPPE, SECRETARY OF THE INTERIOR, ET AL. *v.* SIERRA CLUB ET AL.; and

No. 75–561. AMERICAN ELECTRIC POWER SYSTEM ET AL. *v.* SIERRA CLUB ET AL. C. A. D. C. Cir. Motion of American Public Power Assn. et al. for leave to file a brief as *amici curiae* granted. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Application for stay of injunction entered by the United States Court of Appeals for the District of Columbia Circuit on January 3, 1975, and continued on June 16, 1975, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted pending final disposition of these cases. Reported below: 169 U. S. App. D. C. 20, 514 F. 2d 856.

No. 75–567. OREGON EX REL. STATE LAND BOARD *v.* CORVALLIS SAND & GRAVEL CO.; and

No. 75–577. CORVALLIS SAND & GRAVEL CO. *v.* OREGON EX REL. STATE LAND BOARD. Sup. Ct. Ore. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 272 Ore. 545, 536 P. 2d 517; 272 Ore. 550, 538 P. 2d 70.

Certiorari Denied. (See also Nos. 75–666 and 75–5738, *supra.*)

No. 75–67. UNITED STATES *v.* ROBBINS. C. A. 6th Cir. Certiorari denied. Reported below: 510 F. 2d 301.

No. 75–125. GETTY *v.* KENTUCKY BAR ASSN. Ct. App. Ky. Certiorari denied. Reported below: 535 S. W. 2d 91.

No. 75–264. HOGERVORST *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 75–340. BRODERICK ET AL. *v.* DIGRAZIA, BOSTON POLICE COMMISSIONER. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: —— Mass. ——, 330 N. E. 2d 199.

No. 75–360. MARSHALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 274.

No. 75–421. FRED IMBERT, INC. *v.* COMPAGNIE GENERALE TRANSATLANTIQUE. C. A. 1st Cir. Certiorari denied. Reported below: 517 F. 2d 371.

No. 75–422. INTERNATIONAL ENGINEERING CO., A DIVISION OF A-T-O, INC. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 167 U. S. App. D. C. 396, 512 F. 2d 573.

No. 75–431. GOSNELL ET AL. *v.* HOLSON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 264 S. C. 619, 216 S. E. 2d 539.

No. 75–439. McSPADDEN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 42 Ohio St. 2d 307, 329 N. E. 2d 85.

No. 75–440. MANDELL *v.* UNITED STATES; and
No. 75–441. MANDELL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 671.

No. 75–451. COHEN *v.* ANCHOR HOCKING GLASS CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 1404.

No. 75–457. VENIOS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 506.

No. 75–461. MITCHELL *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 75–464. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 1068.

No. 75–470. THORNBURG *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 1397.

No. 75–471. COLLIS *v.* KENTUCKY BAR ASSN. Ct. App. Ky. Certiorari denied. Reported below: 535 S. W. 2d 95.

No. 75–472. BETTIS CORP. ET AL. *v.* CHARLES WHEATLEY Co. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 486.

No. 75–479. McFARLAND *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 38, 517 F. 2d 938.

No. 75–483. POHLMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 522 F. 2d 974.

No. 75–488. AGUILERA-ENRIQUEZ *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 565.

No. 75–501. BROWN, AKA FEDERICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 585.

No. 75–506. BOYD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 520 F. 2d 642.

No. 75–507. MATTHEWS *v.* UNITED STATES; and
No. 75–538. GRANCICH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 518 F. 2d 352.

No. 75–508. KAESERMAN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 75–511. H. B. BUSTER HUGHES, INC. *v.* OCEAN DRILLING & EXPLORATION CO. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 817.

No. 75–514. VEGA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1088.

No. 75–516. HICKMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 323.

No. 75–518. BRANCATO ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 904.

No. 75–523. KAPLAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–539. AQUILA ET AL. *v.* BRICHFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1402.

No. 75–526. LOCAL 1104, COMMUNICATIONS WORKERS OF AMERICA, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 411.

No. 75–546. KLEIFGEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–547. PUN HOI CHENG *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1351.

No. 75–557. NEW MEXICO *v.* MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 10th Cir. Certiorari denied. Reported below: 517 F. 2d 989.

No. 75–559. VESPE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 520 F. 2d 1369.

No. 75–574. TOPSY'S INTERNATIONAL, INC., ET AL. *v.* SEIFFER ET AL.; and

No. 75–633. TOUCHE ROSS & CO. *v.* SEIFFER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 520 F. 2d 795.

No. 75–575. KLEIN ET AL. *v.* CITY OF MENLO PARK ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–581. CIVITA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 521 F. 2d 1397.

No. 75–585. REILLY *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1399.

No. 75–590. CONSUMERS UNION OF THE UNITED STATES, INC. *v.* PERIODICAL CORRESPONDENTS' ASSN. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 169 U. S. App. D. C. 370, 515 F. 2d 1341.

No. 75–589. DI VIAIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1398.

No. 75–591. DIEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 892.

No. 75–603. M. C. MANUFACTURING CO., INC., ET AL. *v.* TEXAS FOUNDRIES, INC. Ct. Civ. App. Tex., 9th Sup. Jud. Dist. Certiorari denied. Reported below: 519 S. W. 2d 269.

No. 75–605. WYATT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 1402.

No. 75–607. ASSOCIATION OF MASSACHUSETTS CONSUMERS, INC. *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 170 U. S. App. D. C. 118, 516 F. 2d 711.

No 75–614. HAPAG-LLOYD, A. G., ET AL. *v.* TEXACO PANAMA, INC.; and

No. 75–665. FITZGERALD, PUBLIC ADMINISTRATOR OF NEW YORK COUNTY, ET AL. *v.* TEXACO INC. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 448.

No. 75–617. GREENBERG ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 588.

No. 75–625. PERRY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 520 F. 2d 235.

No. 75–627. MCDONNELL DOUGLAS CORP. *v.* TUFT. C. A. 8th Cir. Certiorari denied. Reported below: 517 F. 2d 1301.

No. 75–630. TERMINAL FLOUR MILLS CO. ET AL. *v.* HELIX MILLING CO. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 1317.

No. 75–631. ALDER ET AL. *v.* SANDSTROM, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 317 So. 2d 732.

No. 75–635. DONOVAN ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1316.

No. 75–637. TAYLOR ET AL. *v.* R & A CONSTRUCTION, INC., ET AL. Ct. App. Wash. Certiorari denied.

No. 75–645. MORTON ET AL. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: —— Colo. ——, 539 P. 2d 1255.

No. 75–646. A/S ARCADIA *v.* GULF INSURANCE CO. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 756.

No. 75–653. WEEKS, CHAIRMAN, DUPAGE COUNTY BOARD OF COMMISSIONERS, ET AL. *v.* CLARK, TREASURER OF DUPAGE COUNTY, ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–654. BENNER GLASS CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 641.

No. 75–660. JACOBI ET AL. *v.* BACHE & CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1231.

No. 75–687. CLARK ET AL. *v.* AMERICAN NATIONAL BANK & TRUST COMPANY OF CHATTANOOGA. Ct. App. Tenn. Certiorari denied. Reported below: 531 S. W. 2d 563.

No. 75–663. VAUGHN *v.* G. D. SEARLE & Co. Sup. Ct. Ore. Certiorari denied. Reported below: 272 Ore. 367, 536 P. 2d 1247.

No. 75–664. SCHURMANN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1088.

No. 75–667. EXHIBITORS POSTER EXCHANGE, INC., ET AL. *v.* NATIONAL SCREEN SERVICE CORP. ET AL.; and POSTER EXCHANGE, INC. *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 110 (first case); 517 F. 2d 117 (second case).

No. 75–668. AMERICAN INVESTMENT CO. ET AL. *v.* HARRIS. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 220.

No. 75–673. NATIONAL SHIPPING & TRADING CORP. ET AL. *v.* INTEROCEAN SHIPPING CO. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 527.

No. 75–674. WHEELING-PITTSBURGH STEEL CORP. *v.* GRIFFITH ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 31.

No. 75–675. SCHWARTZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 75–683. NMS INDUSTRIES, INC. *v.* SCHWARTZ ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 925.

No. 75–685. TUCKER *v.* KENTUCKY BAR ASSN. Ct. App. Ky. Certiorari denied. Reported below: 535 S. W. 2d 97.

No. 75–686. ZAMRZLA *v.* SANDERS. Ct. App. Okla. Certiorari denied.

No. 75–688. L Q Motor Inns, Inc., et al. *v.* Spector. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 278.

No. 75–690. Cotton Baking Co., Inc. *v.* Local 369, Bakery & Confectionery Workers International Union of America, AFL–CIO. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 1235.

No. 75–692. Steiner *v.* Ball et al. Cir. Ct. Va., Arlington County. Certiorari denied.

No. 75–694. David G. Allen Co., Inc. *v.* Pilot Freight Carriers, Inc. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 315, 212 S. E. 2d 699.

No. 75–695. Pryor et al. *v.* American President Lines; and Sacilotto *v.* National Shipping Corp. et al. C. A. 4th Cir. Certiorari denied. Reported below: 520 F. 2d 974 (first case); 520 F. 2d 983 (second case).

No. 75–697. Dickstein et al. *v.* Seventy Corp. et al. C. A. 6th Cir. Certiorari denied. Reported below: 522 F. 2d 1294.

No. 75–704. Monsanto Co. *v.* Reed Bros., Inc. C. A. 8th Cir. Certiorari denied. Reported below: 525 F. 2d 486.

No. 75–714. Heilig *v.* Christensen, Judge, et al. Sup. Ct. Nev. Certiorari denied. Reported below: 91 Nev. 120, 532 P. 2d 267.

No. 75–742. First American Bank & Trust Co. et al. *v.* Ellwein, Commissioner, State Banking Board, et al. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 1309.

No. 75–723. TRIANO *v.* SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 75–741. LEE ET AL. *v.* VENICE WORK VESSELS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 85.

No. 75–743. HIEGER ET AL. *v.* FORD MOTOR CO. C. A. 6th Cir. Certiorari denied. Reported below: 516 F. 2d 1324.

No. 75–5130. COLON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 461 Pa. 577, 337 A. 2d 554.

No. 75–5222. SCOTT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 2d 697.

No. 75–5249. OLIVER *v.* UNITED STATES DEPARTMENT OF JUSTICE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 426.

No. 75–5306. WILLIAMS *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5325. LEE *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 75–5344. DELEO *v.* POGUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5351. MCKINNEY *v.* WALKER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 75–5362. BELT *v.* UNITED STATES; and

No. 75–5644. ROUILLARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 516 F. 2d 873.

No. 75–5364. PRESTIDGE *v.* UNITED STATES;

No. 75–5398. MCGRUDER *v.* UNITED STATES; and

No. 75–5484. TREVINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 F. 2d 1288.

No. 75–5370. FRUGE *v.* ZAPATA OFFSHORE DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 512 F. 2d 1404.

No. 75–5372. HERNANDEZ-URIBE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 515 F. 2d 20.

No. 75–5376. WELCH *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5380. LADD *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5382. CRAWFORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 519 F. 2d 347.

No. 75–5414. STEPINS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5423. WORTH *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 217 Kan. 393, 537 P. 2d 191.

No. 75–5429. HARKINS *v.* DRAVO CORP. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1398.

No. 75–5432. GUEL-PERALES ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied.

No. 75–5456. BLACKSHEAR *v.* GRIGGS, INSTITUTION SUPERINTENDENT. Sup. Ct. Cal. Certiorari denied.

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No. 75–5458. WINGARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 522 F. 2d 796.

No. 75–5473. ANTONIOU *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 590.

No. 75–5474. ENGRAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 337 A. 2d 488.

No. 75–5477. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 336 A. 2d 545.

No. 75–5482. ALEXANDER *v.* GARDNER-DENVER CO. C. A. 10th Cir. Certiorari denied. Reported below: 519 F. 2d 503.

No. 75–5486. LUNN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 88 N. M. 64, 537 P. 2d 672.

No. 75–5488. ALBANESE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 1397.

No. 75–5493. JAMES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 519 F. 2d 1348.

No. 75–5496. FINCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1087.

No. 75–5497. VICKERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 899.

No. 75–5504. POND *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 210.

No. 75–5523. CHAMBERS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 524 S. W. 2d 826.

No. 75–5547. STULL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 687.

No. 75–5548. WOLFISH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 525 F. 2d 457.

No. 75–5549. RUTH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1399.

No. 75–5550. MCCOY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 962.

No. 75–5551. CAVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–5552. TRABACCHI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 526 F. 2d 585.

No. 75–5562. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1088.

No. 75–5568. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5569. SCOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 75–5575. PHILLIPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 48.

No. 75–5577. VAN ORSDELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 1323.

No. 75–5588. JONES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5608. BENIGNO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 565.

No. 75–5622. NOVELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 519 F. 2d 1078.

No. 75–5624. CRUZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 473.

No. 75–5647. CLARK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 695.

No. 75–5668. COLLINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1051.

No. 75–5675. DEVONISH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–5681. ROBINSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 75–5683. BARBER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 75–5685. TOLBERT ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5692. VAN ALSTYNE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 46 Cal. App. 3d 900, 121 Cal. Rptr. 363.

No. 75–5698. KRIDER *v.* WOLFF, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 1297.

No. 75–5701. REED *v.* COOK, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 75–5703. BOCCHETTA ET AL. *v.* LOYOLA UNIVERSITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 75–5704. MILES *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5705. BOWEN *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5719. CUTCHENS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 310 So. 2d 273.

No. 75–5721. RICHMAN ET UX. *v.* WALKER, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 525 F. 2d 694.

No. 75–5723. MCKNIGHT *v.* OHIO. Ct. App. Ohio, Stark County. Certiorari denied.

No. 75–5724. TURNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 75–5725. HUSKEY ET AL. *v.* WOODCOCK ET AL.; and GABAUER *v.* WOODCOCK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 520 F. 2d 1096 (first case); 520 F. 2d 1084 (second case).

No. 75–5726. PACE *v.* ALABAMA. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–5727. EAGEN *v.* ALABAMA. C. A. 5th Cir. Certiorari denied.

No. 75–5734. SWITZER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 75–5736. DENMAN *v.* WERTZ. C. A. 6th Cir. Certiorari denied.

No. 75–5737. ROGERS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 43 Ohio St. 2d 28, 330 N. E. 2d 674.

No. 75–5742. HUNTER *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 75–5745. DIAZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–5753. HOLDING *v.* HOLDING. Sup. Ct. Va. Certiorari denied.

No. 75–5754. GOBIE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 75–5760. FISH *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5765. MILLER *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5766. CANTY *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 587.

No. 75–5768. HOGAN *v.* HAVENER, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 519 F. 2d 1402.

No. 75–5770. TURLEY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 75–5775. EMERSON *v.* LASH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 521 F. 2d 1403.

No. 75–5777. VAN METER *v.* SECURITY SAVINGS BANK ET AL. C. A. 8th Cir. Certiorari denied.

No. 75–5783. DILLARD *v.* NEW YORK CITY TRANSIT AUTHORITY. Ct. App. N. Y. Certiorari denied. Reported below: 37 N. Y. 2d 806, 338 N. E. 2d 326.

No. 75–5791. LABELLE *v.* LAVALLEE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 750.

No. 74–1213. CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE, ET AL. *v.* HOMEMAKERS, INC., OF LOS ANGELES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 509 F. 2d 20.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, dissenting.

This petition presents the questions whether a California statute [1] that requires covered employers to pay premium overtime wages to female employees, with no such requirement as to male employees, conflicts with and is pre-empted by § 703 (a) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U. S. C. § 2000e–2 (a), and, if so, whether the federal courts should remedy its invalidity by declaring that an employer may disregard the California statute and need not pay premium overtime wages to female employees. The Court of Appeals answered both questions in the affirmative, 509 F. 2d 20 (CA9 1974), and approved the District Court's refusal, 356 F. Supp. 1111, 1112 (ND Cal. 1973), to follow a decision of another Court of Appeals that is in square conflict on both questions. *Hays* v. *Potlatch Forests, Inc.*, 465 F. 2d 1081 (CA8 1972), aff'g 318 F. Supp. 1368 (ED Ark. 1970). These are substantial questions, and it is the Court's duty to resolve this disagreement which

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[1] Cal. Labor Code § 1350.5 (a) (1971):

"Employers of employees covered under the provisions of the Fair Labor Standards Act may employ females up to 10 hours during any one day of 24 hours or up to 58 hours in one week, provided that they are compensated at the rate of 1½ times the regular rate of pay for time worked for one employer in excess of eight hours in any one day or 40 hours in any one week."

Only the overtime premium requirement is at issue in this case. The maximum hour limitations were held invalid in *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (CA9 1971).

now impedes the important process of reconciling the federal statutes outlawing sex-based discrimination in employment with numerous "protective" state employment laws applicable only to female employees.

Respondent Homemakers, which employs men and women, filed suit in District Court asking that Cal. Labor Code § 1350.5 (a) (1971) be declared in conflict with Title VII and unenforceable. It argued that to pay the overtime premium to female employees in compliance with state law would violate Title VII because there was no statutory requirement to pay such wages to male employees. Without discussion the District Court concluded that requiring payment of premium overtime wages only to female employees did conflict with Title VII. "[A]ware that the only authority directly on this issue is contrary," the District Court declined the State's invitation to follow *Hays* v. *Potlatch Forests, Inc., supra,* and to require Homemakers to pay the same overtime premium to men as to women. To do so "would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature." 356 F. Supp., at 1112. The District Court also rejected the State's argument that both federal [2] and state [3] "equal pay" laws required Homemakers to equalize wages by paying premium overtime wages to male employees, not by forbidding payment of such wages to female employees. It reasoned that the State's position conflicted with the purpose of the "equal pay" statutes which was "to protect only working women, not men, by supplementing women's income in an attempt to narrow the gap between the income of working women and that

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[2] § 3 of the Equal Pay Act of 1963, 77 Stat. 56, amending § 6 of the Fair Labor Standards Act of 1938, 52 Stat. 1062, 29 U. S. C. § 206 (d).

[3] Cal. Labor Code § 1197.5 (1971).

of men similarly employed." *Ibid.* The Court of Appeals affirmed the judgment that § 1350.5 (a) conflicted with Title VII and was unenforceable, expressly approving the District Court's refusal to follow *Hays* v. *Potlatch Forests, Inc., supra.* 509 F. 2d, at 22–23.

The statute at issue in *Hays,* Ark. Stat. Ann. § 81–601 (1960), is essentially indistinguishable from § 1350.5 (a) and was upheld in District Court against the claim that it had been superseded by Title VII and should be declared unenforceable. The Court of Appeals for the Eighth Circuit affirmed, holding that the Arkansas statute was not inconsistent with Title VII because it " 'does not say that women must be paid more than men; it simply says that they must be paid daily overtime without making a similar requirement as to men,' " 465 F. 2d, at 1082, quoting 318 F. Supp., at 1375, and that "any discrimination against men resulting from the Arkansas statute is to be cured by extending the benefits of that statute to male employees rather than holding it invalid." 465 F. 2d, at 1083.[4]

I would grant the petition for a writ of certiorari and set the case for oral argument.

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[4] In *Hays* v. *Potlatch Forests, Inc.,* the Court of Appeals noted that extending the benefits to male employees was "in accord with the express policies" of the Equal Pay Act, 29 U. S. C. § 206 (d) (1), 465 F. 2d, at 1083, although the District Court had found "it unnecessary to appraise [the] assertion" that the Equal Pay Act as well as the Civil Rights Act required payment of premium overtime wages to male employees. 318 F. Supp., at 1374 n. 1.

The Court of Appeals for the Eighth Circuit also accorded "great deference" to Equal Employment Opportunity Commission regulations, 29 CFR § 1604.2 (b) (1972), making failure to extend statutory premium overtime benefits to male as well as female employees an "unlawful employment practice." In this case both the District Court, 356 F. Supp., at 1113, and the Court of Appeals, 509 F. 2d, at 22, held that the EEOC did not have authority to issue regulations which modified state substantive law so extensively.

No. 75–273. CLARK *v.* HILLIARD. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 516 F. 2d 1344.

No. 75–482. JEFFERS ET AL. *v.* UNITED STATES; and
No. 75–5492. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions. Reported below: 520 F. 2d 1256.

No. 75–701. SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL. *v.* KEYES ET AL.; and
No. 75–702. CONGRESS OF HISPANIC EDUCATORS ET AL. *v.* SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL. C. A. 10th Cir. Motion of Puerto Rican Legal Defense & Education Fund, Inc., for leave to file a brief as *amicus curiae* in No. 75–702 granted. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion and petitions. Reported below: 521 F. 2d 465.

No. 75–5449. GRACE *v.* HOPPER, WARDEN. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 234 Ga. 669, 217 S. E. 2d 267.

No. 75–5592. SILVA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 517 F. 2d 1401.

No. 75–5761. SCOGGIN *v.* SCHRUNK, MAYOR OF PORTLAND, OREGON, ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 522 F. 2d 436.

Rehearing Denied

No. 75–5412. MILLS *v.* MUSCOGEE COUNTY SUPERIOR COURT, COLUMBUS, GEORGIA, *ante*, p. 989;

No. 75–5476. TARAS *v.* FIRST ARLINGTON NATIONAL BANK, *ante*, p. 998; and

No. 75–5558. ROY *v.* DUNN, *ante*, p. 1022. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 74–1414. SHUMAR *v.* UNITED STATES, *ante*, p. 879. Motion for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these motions.

No. 75–175. GRIFFITH *v.* UNITED STATES, *ante*, p. 926. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

JANUARY 16, 1976

Miscellaneous Order

No. A–637. GRATTON *v.* UNITED STATES. Application for recall and stay of mandate of the United States Court of Appeals for the Seventh Circuit, presented to MR. JUSTICE STEVENS, and by him referred to the Court, denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this application.

JANUARY 19, 1976

Affirmed on Appeal

No. 75–740. GRAHAM *v.* FONG EU, SECRETARY OF STATE OF CALIFORNIA, ET AL. Affirmed on appeal from D. C. N. D. Cal. Reported below: 403 F. Supp. 37.

No. 75–5827. MANES ET AL. *v.* GOLDIN, COMPTROLLER, CITY OF NEW YORK, ET AL. Affirmed on appeal from D. C. E. D. N. Y. Reported below: 400 F. Supp. 23.

Appeals Dismissed

No. 75–481. PENDLETON ET AL. *v.* CALIFORNIA. Appeal from App. Dept., Super. Ct. Cal., County of Orange, dismissed for want of substantial federal question.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Appellants were convicted in the Municipal Court of Orange County of distributing obscene matter in violation of Cal. Penal Code § 311.2 (1970), which provides in pertinent part:

> "(a) Every person who knowingly . . . distributes . . . to others, any obscene matter is guilty of a misdemeanor."

As used in § 311.2,

> " 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." § 311 (a) (Supp. 1975).

On appeal, the Appellate Department of the Superior Court of California for the County of Orange affirmed the convictions.

It is my view that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit

the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 113 (1973) (BRENNAN, J., dissenting). It is clear that, tested by that constitutional standard, § 311.2, as it incorporates the definition of "obscene matter" in § 311 (a), is constitutionally overbroad and therefore invalid on its face. For the reasons stated in my dissent in *Miller* v. *California*, 413 U. S. 15, 47 (1973), and since the judgment of the Appellate Department was rendered after *Miller*, I would reverse. In that circumstance, I have no occasion to consider whether the other questions presented merit plenary review. See *Heller* v. *New York*, 413 U. S. 483, 495 (1974) (BRENNAN, J., dissenting).

Moreover, on the basis of the Court's own holding in *Jenkins* v. *Georgia*, 418 U. S. 153 (1974), its dismissal is improper. As permitted by this Court's Rule 12 (1), which provides that the record in a case need not be certified to this Court, the appellants did not certify the allegedly obscene materials involved in this case. It is plain, therefore, that the Court, which has not requested the certification of those materials, has failed to discharge its admitted responsibility under *Jenkins* independently to review those materials under the second and third parts of the *Miller* obscenity test.

No. 75–622. JOHNS-MANVILLE PRODUCTS CORP. *v.* COMMISSIONER OF REVENUE ADMINISTRATION. Appeal from Sup. Ct. N. H. dismissed for want of substantial federal question. MR. JUSTICE POWELL would note probable jurisdiction and set case for oral argument. Reported below: 115 N. H. 428, 343 A. 2d 221.

No. 75–761. DONOHUE *v.* CITY OF SAN JOSE. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of

substantial federal question. Reported below: 51 Cal. App. 3d 40, 123 Cal. Rptr. 804.

No. 75–5520. LANG *v.* ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction, it appearing that there is no final judgment of the highest court of a State wherein a judgment could be had as required by 28 U. S. C. § 1257.

Certiorari Granted—Vacated and Remanded. (See also No. 75–584, *ante*, p. 326.)

No. 74–1184. AMERICAN TRADING TRANSPORTATION CO., INC., ET AL. *v.* ESCOBAR. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *American Foreign S. S. Co.* v. *Matise*, *ante*, p. 150. MR. JUSTICE STEVENS took no part in the consideration or decision of this case. Reported below: 503 F. 2d 271.

Certiorari Dismissed. (See No. 75–543, *ante*, p. 325.)

Miscellaneous Orders

No. A–503 (75–5731). BEALS *v.* UNITED STATES. C. A. 6th Cir. Application for bail, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied.

No. D–55. IN RE DISBARMENT OF SILVERTON. It having been reported to the Court that Ronald Robert Silverton, of Los Angeles, Cal., has been disbarred from the practice of law by the Supreme Court of California, and this Court by order of October 6, 1975 [*ante*, p. 812], having suspended the said Ronald Robert Silverton from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and

served upon the respondent and a response having been filed thereto;

It is ordered that the said Ronald Robert Silverton be disbarred from the practice of law in this Court and that his name be stricken from the role of attorneys admitted to practice before the Bar of this Court.

No. 73–1288. ALFRED DUNHILL OF LONDON, INC. *v.* REPUBLIC OF CUBA ET AL. C. A. 2d Cir. [Certiorari granted, 416 U. S. 981.] Motion of John G. Laylin et al. for leave to file a brief as *amici curiae* denied.

No. 74–1151. PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. *v.* DANFORTH, ATTORNEY GENERAL OF MISSOURI, ET AL.; and

No. 74–1419. DANFORTH, ATTORNEY GENERAL OF MISSOURI *v.* PLANNED PARENTHOOD OF CENTRAL MISSOURI ET AL. Appeals from D. C. E. D. Mo. [Probable jurisdiction noted, *ante*, p. 819.] Motion of Missouri Nurses for Life for leave to file a brief as *amicus curiae* granted.

No. 74–1318. DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motion of Equal Rights Advocates, Inc., et al. for leave to file a brief as *amici curiae* granted. Motion of respondents for divided argument granted.

No. 74–1542. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 821.] Motion of Exxon Corp. et al. for leave to file an untimely brief as *amici curiae* denied.

No. 75–110. SAKRAIDA *v.* AG PRO, INC. C. A. 5th Cir. [Certiorari granted, *ante*, p. 891.] Motion of Bar Association for the District of Columbia for leave to file a brief as *amicus curiae* granted.

No. 74–6438. SCOTT ET AL. *v.* KENTUCKY PAROLE BOARD ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 1031.] Respondents' suggestion of mootness and motion of petitioners to substitute James Ray Brumley et al. in place of Ewell Scott as parties petitioner deferred to hearing of case on the merits.

No. 75–260. MCDONALD ET AL. *v.* SANTA FE TRAIL TRANSPORTATION CO. ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 923.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* denied.

No. 75–312. YOUNG, MAYOR OF DETROIT, ET AL. *v.* AMERICAN MINI THEATRES, INC., ET AL. C. A. 6th Cir. [Certiorari granted *sub nom. Gribbs* v. *American Mini Theatres, Inc.*, *ante*, p. 911.] Motions of Motion Picture Association of America, Inc., and American Civil Liberties Union et al. for leave to file briefs as *amici curiae* denied.

No. 75–5932. HARPER *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Denied

No. 75–395. SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION EX REL. DIVISION OF HIGHWAYS *v.* SCHUMAKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 518 F. 2d 653.

No. 75–594. INTERCOUNTY CONSTRUCTION CO. *v.* OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 522 F. 2d 777.

No. 75–643. ALLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 522 F. 2d 1229.

No. 75–680. CAMPBELL ET AL. *v.* BEAUGHLER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 519 F. 2d 1307.

No. 75–710. BOLT, BERANEK & NEWMAN, INC. *v.* MCDONNELL DOUGLAS CORP. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 338.

No. 75–722. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL–CIO *v.* REA EXPRESS, INC. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 164.

No. 75–728. ROSENSTOCK *v.* ROSENSTOCK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 75–733. LONG ISLAND LIGHTING CO. ET AL. *v.* STANDARD OIL COMPANY OF CALIFORNIA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 1269.

No. 75–738. TESAR *v.* TOWN OF CRETE, NEBRASKA. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 1404.

No. 75–749. NORRIS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 26 N. C. App. 259, 215 S. E. 2d 875.

No. 75–752. DECOSTA *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 520 F. 2d 499.

No. 75–755. 28 EAST JACKSON ENTERPRISES, INC. *v.* CULLERTON, COOK COUNTY ASSESSOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 523 F. 2d 439.

No. 75–756. SMITH ET AL. *v.* SMITH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 523 F. 2d 121.

No. 75–782. PELTZMAN *v.* CENTRAL GULF LINES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 96.

No. 75–789. MCGEE *v.* BURLINGTON NORTHERN, INC. Sup. Ct. Mont. Certiorari denied. Reported below: — Mont. —, 540 P. 2d 298.

No. 75–795. CISSELL, TRUSTEE IN BANKRUPTCY *v.* AMERICAN HOME ASSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 521 F. 2d 790.

No. 75–5460. MODESKY *v.* MORRIS, SECRETARY, DEPARTMENT OF SOCIAL AND HEALTH SERVICES OF WASHINGTON, ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5472. DIMERY *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 274 Md. 661, 338 A. 2d 56.

No. 75–5499. SAFELY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5510. WALKER *v.* DURLEY ET AL. Sup. Ct. Cal. Certiorari denied.

No. 75–5525. GREEN ET AL. *v.* UNITED STATES; and No. 75–5670. PICCORA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 523 F. 2d 229.

No. 75–5527. DEAN *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 67 Wis. 2d 513, 227 N. W. 2d 712.

No. 75–5545. WINGATE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 309.

No. 75–5581. WARREN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–5604. CRAFT *v.* LOUISIANA ET AL. Sup. Ct. La. Certiorari denied.

No. 75–5610. LARSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 525 F. 2d 444.

No. 75–5612. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 523 F. 2d 185.

No. 75–5614. JASPER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 523 F. 2d 395.

No. 75–5629. GOODRICH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5633. BARR *v.* OLIVER, U. S. DISTRICT JUDGE. C. A. 8th Cir. Certiorari denied.

No. 75–5642. QUILLEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 75–5645. TRUJILLO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–5655. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 75–5664. WHEELER *v.* NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. Sup. Ct. N. H. Certiorari denied. Reported below: 115 N. H. 347, 341 A. 2d 777.

No. 75–5669. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 75–5672. OLSEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 521 F. 2d 1404.

No. 75-5695. BJORNSON ET AL. *v.* UNITED STATES C. A. 5th Cir. Certiorari denied.

No. 75–5708. LUDWIG ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 705.

No. 75–5718. HERRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 813.

No. 75–5732. CARTER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 207 Ct. Cl. 316, 518 F. 2d 1199.

No. 75–5784. ROOT *v.* TERRITORY OF GUAM. C. A. 9th Cir. Certiorari denied. Reported below: 524 F. 2d 195.

No. 75–5789. ASHFORD *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 515 F. 2d 1181.

No. 75–5793. KESER *v.* REGAN, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 521 F. 2d 1400.

No. 75–5797. MCCRAY *v.* BOSLOW, INSTITUTION DIRECTOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 526 F. 2d 589.

No. 75–5798. GASPERICH *v.* CHURCH. Ct. App. Md. Certiorari denied. Reported below: 275 Md. 534, 341 A. 2d 789.

No. 75–5802. AGNES *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 75–5804. CARTER *v.* WALKER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 941.

No. 75–5805. STRATTON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 30 Ill. App. 3d 550, 332 N. E. 2d 556.

No. 75–5806. OLDEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 75–5808. MILLER *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 75–5812. WILLIAMS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 48 App. Div. 2d 1015, 372 N. Y. S. 2d 568.

No. 75–5814. GILLIARD *v.* CASSCLES, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 75–5816. LUCKETT *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 91 Nev. 681, 541 P. 2d 910.

No. 75–5819. CRONNON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 56 Ala. App. 192, 320 So. 2d 697.

No. 75–5820. SCARPELLI *v.* WORKMEN'S COMPENSATION APPEAL BOARD ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 18 Pa. Commw. 30, 333 A. 2d 828.

No. 75–5821. JONES *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 75–5823. WAGNER *v.* CUPP, PENITENTIARY SUPERINTENDENT. Ct. App. Ore. Certiorari denied.

No. 75–5824. VAN METER *v.* MORGAN, SHERIFF. C. A. 8th Cir. Certiorari denied.

No. 74–758. PROVIDENT SECURITIES CO. *v.* FOREMOST-MCKESSON, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 506 F. 2d 601.

No. 74–1328. JENKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 513 F. 2d 633.

No. 75–580. ALLIS-CHALMERS MANUFACTURING CO. *v.* GULF & WESTERN INDUSTRIES, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 527 F. 2d 335.

No. 75–721. PHELPS *v.* CHRISTISON, RECEIVER. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75–5611. LISK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 522 F. 2d 228.

No. 75–82. SHEET METAL WORKERS' INTERNATIONAL ASSN. *v.* CARTER. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 133 Ga. App. 872, 212 S. E. 2d 645.

No. 75–184. LAVALLEE, CORRECTIONAL SUPERINTENDENT *v.* ROGERS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 517 F. 2d 1330.

No. 75–502. AMERICAN MARINE CORP. *v.* LOUVIERE ET AL.; and

No. 75–505. PNEUMATIC SERVICE & EQUIPMENT CO. ET AL. *v.* LOUVIERE ET AL. C. A. 5th Cir. Motion of respondents Louviere et al. for leave to proceed *in forma pauperis* in No. 75–505 granted. Certiorari denied. Reported below: 509 F. 2d 278 and 515 F. 2d 571.

No. 75–449. COOK & CO., INC. *v.* PIERCE ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 720.

No. 75–493. ILLINOIS *v.* LANG. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 26 Ill. App. 3d 648, 325 N. E. 2d 305.

No. 75–5391. DEMPSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 513 F. 2d 274.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

Petitioner was charged with conspiracy to possess and distribute cocaine under an indictment that alleged seven overt acts involving petitioner. Three of these acts were the subject of an earlier indictment charging substantive offenses, and petitioner had pleaded guilty to the substantive indictment before the conspiracy indictment was returned. Petitioner made a timely claim in the District Court that the conspiracy indictment should be dismissed as barred by the Double Jeopardy Clause and collateral estoppel. He also argued that he would not have pleaded guilty had he known that the Government would follow with a conspiracy indictment. His claim was rejected, and his conviction after a jury trial was affirmed on appeal. *United States* v. *Marshall*, 513 F. 2d 274 (CA5 1975).

The two indictments concerned charges against petitioner that clearly arose out of the same criminal transaction or episode. In that circumstance, I would grant the petition for certiorari and reverse the conspiracy conviction. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment requires prosecution in

one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Susi* v. *Flowers*, *ante*, p. 1006 (BRENNAN, J., dissenting); *Vardas* v. *Texas*, *ante*, p. 904 (BRENNAN, J., dissenting); *Stewart* v. *Iowa*, *ante*, p. 902 (BRENNAN, J., dissenting); *Waugh* v. *Gray*, 422 U. S. 1027 (1975) (BRENNAN, J., dissenting); *Wells* v. *Missouri*, 419 U. S. 1075 (1974) (BRENNAN, J., dissenting); *Moton* v. *Swenson*, 417 U. S. 957 (1974) (BRENNAN, J., dissenting); *Tijerina* v. *New Mexico*, 417 U. S. 956 (1974) (BRENNAN, J., dissenting); *Ciuzio* v. *United States*, 416 U. S. 995 (1974) (BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (concurring statement); *Waller* v. *Florida*, 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White*, 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown*, 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana*, 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974); *State* v. *Gregory*, 66 N. J. 510, 333 A. 2d 257 (1975).

No. 75–5538. CHAVIS ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion for an *in camera* examination of amended statements of a State's witness and certiorari denied. Reported below: 287 N. C. 261, 214 S. E. 2d 434.

Rehearing Denied

No. 74–1418. BUCHANAN ET AL. *v.* EVANS ET AL., *ante*, p. 963. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 74–1457. SUMITOMO FORESTRY CO., LTD., OF JAPAN *v.* THURSTON COUNTY, WASHINGTON, *ante*, p. 831;

No. 75–124. TEXAS *v.* WHITE, *ante*, p. 67;

No. 75–301. BAUMAN *v.* UNITED STATES, *ante*, p. 946;

No. 75–314. RITTER *v.* KLEPPE, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 947;

No. 75–467. WIETHE *v.* CURRY, *ante*, p. 941;

No. 75–560. BURNS *v.* DECKER ET AL., *ante*, p. 1017;

No. 75–5124. WARD *v.* CARPENTER, SHERIFF, *ante*, p. 916;

No. 75–5212. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE, *ante*, p. 949;

No. 75–5312. RANDLE *v.* UNITED STATES, *ante*, p. 988;

No. 75–5396. BLEVINS *v.* UNITED STATES, *ante*, p. 1020;

No. 75–5404. TODA *v.* TANAKA, *ante*, p. 989;

No. 75–5408. GREEN *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante*, p. 976;

No. 75–5409. BURDEAU *v.* TRUSTEES OF THE CALIFORNIA STATE COLLEGES ET AL., *ante*, p. 989;

No. 75–5420. ROOTS *v.* WOODALL, *ante*, p. 997;

No. 75–5450. CURRY *v.* JENSEN ET AL., *ante*, p. 998;

No. 75–5490. CLARK *v.* ALABAMA, *ante*, p. 937;

No. 75–5531. WILLIAMS *v.* NEW YORK, *ante*, p. 990; and

No. 75–5573. GREEN *v.* DEPARTMENT OF PUBLIC WELFARE OF MASSACHUSETTS, *ante*, p. 976. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

No. 74–6663. SWANSON *v.* ESTELLE, CORRECTIONS DIRECTOR, *ante*, p. 858. Motion for leave to file petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

JANUARY 21, 1976

Dismissal Under Rule 60

No. 75–850. FLEMING ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 526 F. 2d 191.

JANUARY 22, 1976

Certiorari Granted

No. 74–6257. GREGG *v.* GEORGIA. Sup. Ct. Ga. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 4 presented by the petition which reads as follows: "Whether the imposition and carrying out of the sentence of death for the crime of murder under the law of Georgia violates the Eighth or Fourteenth Amendment to the Constitution of the United States?" Reported below: 233 Ga. 117, 210 S. E. 2d 659;

No. 75–5394. JUREK *v.* TEXAS. Ct. Crim. App. Tex. Motion for leave to proceed *in forma pauperis* granted. Certiorari limited to Question 1 presented by the petition which reads as follows: "Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?" Reported below: 522 S. W. 2d 934;

No. 75–5491. WOODSON ET AL. *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 287 N. C. 578, 215 S. E. 2d 607;

No. 75–5706. PROFFITT *v.* FLORIDA. Sup. Ct. Fla. Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 315 So. 2d 461; and

No. 75–5844. ROBERTS *v.* LOUISIANA. Sup. Ct. La.

Motion for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 319 So. 2d 317.

Briefs for petitioners in all of the foregoing cases [Nos. 74–6257 through 75–5844] shall be filed with the Clerk on or before February 25, 1976. Briefs for respondents shall be filed on or before March 25, 1976. Cases set for oral argument at 1 p. m. on March 30, 1976, subject to further order of the Court. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

JANUARY 26, 1976

Affirmed on Appeal

No. 75–716. CARTWRIGHT VAN LINES, INC. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. W. D. Mo. Reported below: 400 F. Supp. 795.

Appeals Dismissed

No. 75–5863. FEREBEE *v.* VIRGINIA. Appeal from Cir. Ct., City of Portsmouth. Appeal dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 75–827. SNOW ET AL. *v.* CITY OF MEMPHIS ET AL. Appeal from Sup. Ct. Tenn. dismissed for want of substantial federal question. Reported below: 527 S. W. 2d 55.

No. 75–525. PIRILLO ET AL. *v.* TAKIFF, JUDGE, ET AL. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 462 Pa. 511, 341 A. 2d 896.

No. 75–822. THOMPSON *v.* KENTON COUNTY BOARD OF ELECTION COMMISSION ET AL. Appeal from Ct. App.

Ky. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Miscellaneous Orders

No. A–472. KELLEY *v.* UNITED STATES ET AL. D. C. C. D. Cal. Reapplication for stay pending appeal, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this reapplication.

No. A–638. HANSON ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Application for temporary restraining order, presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this application.

No. D–59. IN RE DISBARMENT OF NELSON. Raymond Alexander Nelson, of San Anselmo, Cal., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on October 14, 1975 [*ante*, p. 888], is hereby discharged.

No. 52, Orig. UNITED STATES *v.* FLORIDA. Supplemental Report of Special Master received and ordered filed. Parties directed to submit a proposed decree. [See 420 U. S. 531.]

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Motion of New Hampshire Commercial Fishermen's Assn. for leave to file a brief as *amicus curiae* granted. [For earlier orders herein, see, *e. g.*, *ante*, p. 919.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of Special Master on motion of the United States for leave to intervene received and ordered filed. Motion for leave to intervene granted. [For earlier orders herein, see, *e. g.*, *ante*, p. 942.]

No. 74–492. OHIO *v.* GALLAGHER. Sup. Ct. Ohio. [Certiorari granted, 420 U. S. 1003.] Motion of petitioner for leave to file supplemental brief after argument granted, and the brief is to be filed no later than February 13, 1976. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

No. 74–1318. DREW MUNICIPAL SEPARATE SCHOOL DISTRICT ET AL. *v.* ANDREWS ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 820.] Motions of Child Welfare League of America and National Education Assn. for leave to file briefs as *amici curiae* granted.

No. 74–1393. SINGLETON, CHIEF, BUREAU OF MEDICAL SERVICES, DEPARTMENT OF HEALTH AND WELFARE OF MISSOURI *v.* WULFF ET AL. C. A. 8th Cir. [Certiorari granted, 422 U. S. 1041.] Motion of respondents to expand scope of certiorari denied.

No. 75–104. UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL. *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 945.] Motion of Board for Legal Assistance to the Jewish Poor, Inc., et al., for leave to file a brief as *amici curiae* granted. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 74–145. NORTHERN CHEYENNE TRIBE *v.* HOLLOWBREAST ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 891.] Motion of Neil Haight, Esquire, to permit Steven L. Bunch to participate in oral argument *pro hac vice* granted.

No. 75–957. EVANS ET AL. *v.* FROMME ET AL. C. A. 9th Cir. Motion to expedite consideration to consolidate for oral argument with No. 75–817, *Nebraska Press Assn.* v. *Stuart, Judge* [certiorari granted, *ante*, p. 1027], denied.

No. 75–5529. TYLER *v.* WANGELIN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

No. 75–5483. TYLER *v.* WANGELIN, U. S. DISTRICT JUDGE; and

No. 75–5807. MATTHEWS *v.* INGRAHAM, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of prohibition denied.

Certiorari Granted

No. 75–804. HILL *v.* UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, LOCAL 25, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted. Reported below: 49 Cal. App. 3d 614, 122 Cal. Rptr. 722.

Certiorari Denied. (See also Nos. 75–525, 75–822, and 75–5863, *supra.*)

No. 75–454. BRANNON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 25 N. C. App. 635, 214 S. E. 2d 213.

No. 75–576. ERHARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 75–588. WASHINGTON ET AL. *v.* UNITED STATES ET AL.;

No. 75–592. NORTHWEST STEELHEADERS COUNCIL OF TROUT UNLIMITED *v.* UNITED STATES ET AL.; and

No. 75–705. WASHINGTON REEF NET OWNERS ASSN. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 520 F. 2d 676.

No. 75–604. CALDWELL, AKA MORGAN, ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 75–612. QUICKSEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 525 F. 2d 337.

No. 75–619. MANN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 517 F. 2d 259.

No. 75–620. NEIDORF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 916.

No. 75–640. FRANK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 520 F. 2d 1287.

No. 75–706. ADOLPH COORS CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 519 F. 2d 1280.

No. 75–730. RETAIL CREDIT CORP. ET AL. *v.* HOKE. C. A. 4th Cir. Certiorari denied. Reported below: 521 F. 2d 1079.

No. 75–732. KFC NATIONAL MANAGEMENT CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 2d Cir. Certiorari denied.

No. 75–745. CHAYES VIRGINIA CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 519 F. 2d 1406.

No. 75–768. BURGWIN ET AL. *v.* MATTSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 522 F. 2d 1213.

No. 75–779. JACK *v.* BLACK, JUDGE. C. A. 4th Cir. Certiorari denied.

No. 75–786. COUNTY BOARD OF ARLINGTON COUNTY *v.* GOD. Sup. Ct. Va. Certiorari denied. Reported below: 216 Va. 163, 217 S. E. 2d 801.

No. 75–790. MCCULLOUGH *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 13 Wash. App. 1017.

No. 75–793. LOCAL 254, GRAPHIC ARTS INTERNATIONAL UNION, AFL–CIO, ET AL. *v.* WESTERN PUBLISHING CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 522 F. 2d 530.

No. 75–799. SCHWARTZ *v.* SCHWARTZ. Ct. Sp. App. Md. Certiorari denied. Reported below: 26 Md. App. 427, 338 A. 2d 386.

No. 75–801. SPENCE *v.* STATE BAR OF SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 265 S. C. 64, 216 S. E. 2d 870.

No. 75–803. HOFFER ET AL. *v.* ANTHONY DE CRESCENZO, INC. Ct. Sp. App. Md. Certiorari denied. Reported below: 26 Md. App. 655, 338 A. 2d 424.

No. 75–810. CALDWELL *v.* SOUTHEAST TITLE & INSURANCE CO. Sup. Ct. Fla. Certiorari denied. Reported below: 278 So. 2d 350.

No. 75–848. AGOSTI *v.* HUGE ET AL., TRUSTEES. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 224, 521 F. 2d 324.

No. 75–5511. MOORE *v.* KOELZER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 517 F. 2d 1400.

No. 75–5543. FRAZIER *v.* UNITED STATES; and

No. 75–5773. PETERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 524 F. 2d 167.

No. 75–5555. POWERS *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 96 Idaho 833, 537 P. 2d 1369.

No. 75–5598. SNOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5601. SMITH *v.* STYNCHCOMBE, SHERIFF. Sup. Ct. Ga. Certiorari denied. Reported below: 234 Ga. 780, 218 S. E. 2d 63.

No. 75–5619. NATTIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 316 So. 2d 115.

No. 75–5632. PATTERSON *v.* AULT, CORRECTIONS COMMISSIONER, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 521 F. 2d 812.

No. 75–5635. LOGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 75–5643. MURPHY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 517 F. 2d 1395.

No. 75–5657. EDWARDS *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 520 F. 2d 321.

No. 75–5658. WIMBERLY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 75–5659. MARTIN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 75–5660. WEEKS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 316 So. 2d 71.

No. 75–5694. SPRANGLE, AKA GREENE, ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 523 F. 2d 1052.

No. 75–5661. WINTERS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 75–5673. SNOW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 521 F. 2d 730.

No. 75–5691. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 523 F. 2d 64.

No. 75–5707. HINES *v.* BOMBARD, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 521 F. 2d 1109.

No. 75–5729. TEPLITSKY *v.* BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied.

No. 75–5829. NOROIAN ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 75–5834. HARMON *v.* HODGE. C. A. D. C. Cir. Certiorari denied. Reported below: 172 U. S. App. D. C. 224, 521 F. 2d 324.

No. 75–5846. SELLARS *v.* ESTELLE, CORRECTIONS DIRECTOR. Certiorari before judgment to C. A. 5th Cir. Certiorari denied.

No. 75–5852. RANDALL *v.* METHENY ET AL. C. A. 9th Cir. Certiorari denied.

No. 75–5856. BROOKS *v.* BAY STATE ABRASIVE PRODUCTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 516 F. 2d 1003.

No. 75–5859. PATTERSON *v.* BUSBEE, GOVERNOR OF GEORGIA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 523 F. 2d 1053.

No. 75–5862. HOFFMAN *v.* GEORGETOWN UNIVERSITY HOSPITAL CORP. Ct. App. D. C. Certiorari denied.

No. 75–5864. RUDMAN *v.* STONE, CORRECTIONAL SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 75–5865. SANDERS *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 288 N. C. 285, 218 S. E. 2d 352.

No. 75–5872. FORD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 75–5874. WILKINS *v.* WILLIAMS, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 75–5885. TABASSO *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 73–2005. UNITED STATES ET AL. *v.* RAMBO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 492 F. 2d 1060.

No. 74–722. UNITED STATES ET AL. *v.* CLARK ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 501 F. 2d 108.

No. 74–6568. MAURICIO *v.* MCADAMS, WARDEN. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

No. 75–785. MANTA ET AL. *v.* TRYFOROS ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 518 F. 2d 1258.

No. 75–863. CHICAGO RAWHIDE MANUFACTURING CO. *v.* CRANE PACKING CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 523 F. 2d 452.

No. 75–5990. LIPSMAN *v.* GIARDINO. C. A. 2d Cir. Application for stay, presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Certiorari denied.

Rehearing Denied

No. 75–139. ROSE, WARDEN *v.* HODGES ET AL., *ante*, p. 19;

No. 75–406. WUNNICKE ET AL. *v.* UNITED STATES, *ante*, p. 1033;

No. 75–415. PORTLAND CEMENT ASSN. *v.* TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL., *ante*, p. 1025;

No. 75–5154. SAM *v.* MISSISSIPPI, *ante*, p. 1018;

No. 75–5348. LAZUR *v.* BROAD MOUNTAIN CLUB, INC., *ante*, p. 1020;

No. 75–5587. HECKSTALL *v.* DISTRICT OF COLUMBIA, *ante*, p. 1023;

No. 75–5666. HARRIS *v.* NEW YORK, *ante*, p. 1036; and

No. 75–5671. MCLAUGHLIN *v.* VINZANT, CORRECTIONAL SUPERINTENDENT, *ante*, p. 1037. Petitions for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of these petitions.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1092 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ET AL. *v.* HORTONVILLE EDUCATION ASSOCIATION ET AL.

ON APPLICATION FOR STAY

No. A–133 (74–1606). Decided August 18, 1975

Application for stay of Wisconsin Supreme Court judgment, holding on due process grounds that a school board may not properly dismiss teachers employed by it, denied, where it is not clear whether that judgment rested upon the Fourteenth Amendment alone or also upon the Wisconsin Constitution, and whether the judgment was "final" for purposes of 28 U. S. C. § 1257.

See: 66 Wis. 2d 469, 225 N. W. 2d 658.

MR. JUSTICE REHNQUIST, Circuit Justice.

If the judgment of the Supreme Court of Wisconsin were plainly a "final judgment" for purposes of 28 U. S. C. § 1257, and if it plainly rested solely upon a construction of the Fourteenth Amendment to the United States Constitution, I would be inclined to grant the stay requested by the applicant School Board. I think that none of our cases requires the conclusion, reached by the Wisconsin court, that a school board may not be allowed to dismiss teachers whom it employs because it is not the sort of impartial decisionmaker required by due process of law. If this matter were before me on the petition for certiorari where I would be casting my vote as a Member of the Court, I would conclude that the judgment of the Supreme Court of Wisconsin did rest solely upon the Fourteenth Amendment. But in

my capacity as Circuit Justice, where I act "as a surrogate for the entire Court," *Holtzman* v. *Schlesinger*, 414 U. S. 1304, 1313 (1973) (MARSHALL, J., in chambers), doubts as to whether the judgment may not rest also upon a construction of the Wisconsin Constitution, and as to the finality of the judgment, lead me to deny the application.

SMITH ET AL. *v.* UNITED STATES ET AL.

ON APPLICATION FOR STAY

No. A-230. Decided September 11, 1975

Application for stay of District Court's order that the files and records of the federal grand jury that indicted applicants be turned over to a state prosecutor contemplating state prosecution of applicants, is granted pending appeal. There are substantial questions whether (1) the state prosecutor's claimed need for such materials meets the "compelling necessity" standard for disclosure set forth in Fed. Rule Crim. Proc. 6 (e), since, *inter alia*, it is likely that applicants cannot be prosecuted at all under California's double jeopardy provision, (2) the turnover order would nullify the immunity granted to certain federal grand jury witnesses, (3) such order should include illegally seized evidence, and (4) double jeopardy might preclude state prosecution.

MR. JUSTICE DOUGLAS, Circuit Justice.

Substantial questions may be raised under both the Federal Rules of Criminal Procedure and the Constitution whenever an order is made requiring that the files and records of a federal grand jury be turned over to a state prosecutor. Such an order was entered in this case by the District Court. The Court of Appeals for the Ninth Circuit denied a motion to stay the order pending appeal; however, a motions panel of that court granted an emergency stay so that the matter might be presented to me. I have now heard oral argument in Yakima, Wash., and I have concluded that I should issue the stay.

In 1973 and 1974 a federal grand jury in the Southern District of California conducted a lengthy investigation into the affairs of United States National Bank. This investigation resulted in multicount indictments against both applicants. On June 12, 1975, the federal case was

concluded when applicants entered pleas of *nolo contendere* and were sentenced. On August 7, the District Attorney for San Diego County filed a motion in Federal District Court seeking the files and records of the grand jury. That motion, which was opposed by the applicants, has led to the present proceeding.

In a long line of cases the Supreme Court has reaffirmed the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts," *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 681 (1958). See, *e. g.*, *Dennis* v. *United States*, 384 U. S. 855 (1966); *Pittsburgh Plate Glass Co.* v. *United States*, 360 U. S. 395 (1959). Although the Court has affirmed the power of district courts under Fed. Rule Crim. Proc. 6 (e) to order disclosure of evidence presented to grand juries, that Rule has been interpreted to require a showing of "particularized need" or "compelling necessity." See, *e. g.*, *Pittsburgh Plate Glass Co.*, *supra*, at 400. It is a substantial question whether the need cited by the state prosecutor in this case is great enough to justify breach of the grand jury's deliberations. The state prosecutor contends, first, that the grand jury materials will save the State substantial investigatory and prosecutorial resources and, second, that the materials will be generally useful in refreshing the memories of witnesses who appeared before the grand jury. However, it is doubtful whether either of these reasons—which will always be present whenever a State conducts an investigation following a similar one by a federal grand jury—meets the "compelling necessity" standard of Rule 6 (e).

The prosecutor also points out that the California statute of limitations, which is three years for most felonies, see Cal. Penal Code § 800 (1970 and Supp. 1975), will bar prosecution of applicants sometime in 1976. The collapse

of United States National Bank, and presumably the termination of any crimes that applicants may have committed, occurred on October 18, 1973. The prosecutor thus argues that the imminent running of the statute of limitations justifies the turnover order. The collapse of the bank, however, and the initiation of the federal investigation were well publicized. Yet the prosecutor chose to do nothing. Surely a state prosecutor may not demonstrate "compelling necessity" by a state of affairs that his own tardiness has brought about.

Finally, there is a serious question whether applicants can be prosecuted at all under California law. California Penal Code § 656 (1970) forbids prosecution for "act[s] or omission[s]" for which the accused has already stood trial under the laws of "another State, Government, or country." See also Cal. Penal Code §§ 793, 794 (1970). The California Supreme Court has held that a previous federal prosecution acts as a bar, under § 656, to subsequent state prosecution. *People* v. *Belcher,* 11 Cal. 3d 91, 520 P. 2d 385 (1974). It seems likely that a plea of *nolo contendere* would be considered the same for § 656 purposes as a plea of guilty. See, *e. g., North Carolina* v. *Alford,* 400 U. S. 25, 35, and n. 8 (1970). Moreover, the state prosecutor, in his declaration to the District Court, virtually conceded that the California crimes that applicants may have committed are state equivalents to the federal crimes charged in the federal indictment. It is a serious question whether prosecution would thus be based upon the same "act or omission" as the crimes upon which applicants pleaded *nolo contendere* and would thereby be barred under § 656. A substantial question arises whether the requisite showing of need under Rule 6 (e) is satisfied when a state prosecution cannot, under state law, result in conviction.

If the moving parties had been witnesses before the

federal grand jury, serious questions involving the Self-Incrimination Clause of the Fifth Amendment would be involved. No such issue is presented here as to applicants, because they did not testify before the grand jury. Other persons, however, who testified before the grand jury, were granted immunity. Immunity once granted in a federal proceeding may not be nullified by a turnover order obtained by a state prosecutor. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

The District Court, moreover, might have granted motions to suppress evidence that had been obtained by the grand jury, and if that occurred, it is difficult to see how motions that were won before the District Court can be lost at the instance of the state prosecutor. This Court has held that a witness before a grand jury may not refuse to answer questions on the ground that they are based upon evidence obtained in violation of the Fourth Amendment. *United States* v. *Calandra*, 414 U. S. 338 (1974). However, from the fact that a grand jury may use illegally seized evidence, it does not follow that the evidence may in turn be given to a state prosecutor. *Calandra* was based upon the marginal deterrent value that application of the exclusionary rule to grand jury proceedings would have upon illegal police activity. *Id.*, at 351. In addition, the Court found that application of the exclusionary rule would hinder and disrupt grand jury proceedings. *Id.*, at 349. Neither of those reasons has much force in this case. First, there are no grand jury proceedings to disrupt. Second, a turnover of illegally seized evidence may undermine the deterrent effect of the exclusionary rule to a greater extent than contemplated in *Calandra*. Finally, *Calandra* cannot be read as approving illegal seizures of evidence. The only question before the Court was whether a potentially disruptive challenge to the seizure of evidence

would lie during grand jury proceedings. After a trial court has ruled that evidence was, in fact, the product of unconstitutional police activity, there is no excuse for the continued use of the evidence. There apparently is such a question of illegally seized evidence in this case, although the record before me does not show precisely what the evidence suppressed was and how relevant it might be to the state as well as to the federal charges. It would seem to be a substantial question whether a turnover order should include such evidence.*

Double jeopardy might also preclude state prosecution. That kind of objection may, in time, be resolved upon an appropriate motion before state tribunals. I mention the matter because the Double Jeopardy Clause of the Fifth Amendment was held applicable to the States in *Benton* v. *Maryland,* 395 U. S. 784 (1969). *Benton* may cast doubt upon the continuing vitality of *Bartkus* v. *Illinois,* 359 U. S. 121 (1959), which found that successive state and federal prosecutions upon substantially similar charges do not violate the Double Jeopardy Clause. See also *Abbate* v. *United States,* 359 U. S. 187 (1959).

It was suggested at oral argument that applicants' lawless actions can be curbed only by denying them legal refuge. Yet all constitutional guarantees extend both to rich and poor alike, to those with notorious reputations, as well as to those who are models of upright citizenship. No regime under the rule of law

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*It was suggested that applicants should seek relief from any oppressive aspects of the turnover order by appropriate motions in the state courts. It seems apparent, however, that even a cursory examination of the federal grand jury materials would likely give the state prosecutor "leads" to information that would result in a permanent loss to applicants of the value of the secrecy of the grand jury proceedings.

could comport with constitutional standards that drew such distinctions.

I do not, of course, pass on the merits of the turnover order, which is presently before the Court of Appeals. Yet these questions seem to me to be so substantial that I have decided to issue the stay. It will remain in effect until the Court of Appeals decides the merits.

CHAMBER OF COMMERCE OF THE UNITED STATES *v.* LEGAL AID SOCIETY OF ALAMEDA COUNTY ET AL.

ON APPLICATION FOR STAY

No. A–233. Decided September 29, 1975

In the course of an action to compel federal officials to comply with Executive Order No. 11246 (which requires Government contractors to ensure nondiscriminatory employment practices), the District Court entered an order requiring the General Services Administration (GSA) to disclose information reporting on affirmative-action programs and related matters filed with the GSA by Government contractors represented by the applicant. Applicant sought a stay of that order after having been denied a stay by the Court of Appeals. Even though there is a substantial question whether the information is privileged by virtue of § 709 (e) of the Civil Rights Act of 1964, the application must be denied because applicant has failed to show that the irreparable injury which allegedly would result from disclosure is imminent.

MR. JUSTICE DOUGLAS, Circuit Justice.

This application for stay of the discovery order by the District Court seemed to me, when I studied it at Goose Prairie, Wash., to present a series of very important and new questions under the Freedom of Information Act, 5 U. S. C. § 552, for which guidelines would be desirable. Thus I was initially disposed to issue the stay so that in due course new guidelines could be established. But the questions presented involved so many complexities that I felt the application should be put down for oral argument so that all parties could be heard.

The Legal Aid Society of Alameda County, Cal., is suing various federal officials in Federal District Court, seeking mandamus to remedy alleged noncompliance with Executive Order No. 11246, 30 Fed. Reg. 12319

(1965), as amended, 3 CFR 169 (1964). That Order requires employers holding contracts with the Federal Government to ensure nondiscriminatory employment practices through affirmative-action programs. Applicant, the United States Chamber of Commerce, has been permitted by the District Court to intervene on behalf of various contractors with the Federal Government. Pursuant to a Legal Aid request, the District Court ordered disclosure by the General Services Administration (GSA) of information filed with it by the various contractors, *Legal Aid Society* v. *Brennan,* No. C–73–0282 (ND Cal., filed Mar. 26, 1975). The information comprises ethnic composition reports (EEO–1), affirmative-action program reports (AAP), and compliance review reports (CRR). Applicant's petition for a stay of the District Court's discovery order was denied by the Ninth Circuit without opinion, *Legal Aid Society* v. *Brennan,* Civ. No. 75–1870 (filed Aug. 4, 1975), as was its petition for rehearing and suggestion for rehearing en banc, *Legal Aid Society* v. *Brennan, supra* (filed Sept. 2, 1975).

In the District Court's opinion below, much is made of the policy of the Freedom of Information Act which requires access to official agency information. The GSA here is willing to disclose the requested information. But, as the District Court also observed: "[T]he production here sought is not pursuant to the Act, but part of a legitimate discovery effort by plaintiffs. . . . The only legitimate objections one could raise to preclude discovery are, under Fed. R. Civ. P. 26 (c), claims of privilege."

While I agree with the District Court's analysis of the posture of Legal Aid's request for information, I part company with the court when it neglects consideration of the existence of a privilege against discovery protecting those whom the applicant represents. While the Freedom of Information Act creates no privileges, *Verrazzano*

Trading Corp. v. *United States*, 349 F. Supp. 1401 (Cust. 1972), neither does it diminish those existing.

In my mind, a substantial question exists as to whether the parties represented by the applicant enjoy a privilege as to the information contained in the EEO–1's, AAP's, and CRR's. The Equal Employment Opportunity Commission (EEOC) is authorized to obtain the information contained in these reports, under §§ 709 (c) and (d) of the Civil Rights Act of 1964, 78 Stat. 263, as amended, 42 U. S. C. §§ 2000e–8 (c) and (d) (1970 ed., Supp. III). However, § 709 (e) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–8 (e), provides in part:

> "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information."

Accordingly, information contained in the EEO–1's, the AAP's, and the CRR's, which are prepared from the EEO–1's, is arguably protected from disclosure by § 709 (e). See *H. Kessler & Co.* v. *EEOC*, 472 F. 2d 1147, 1152, 1153 (CA5 1973) (en banc) (majority and dissenting opinions).

To be sure, the information in the AAP's and the EEO–1's in this case was not obtained directly by the EEOC. Rather, the information was apparently collected by a Joint Reporting Committee of both the EEOC and the federal compliance agency (in this case, GSA) under Executive Order No. 11246. But the information in the EEO–1's was obtained, in part, on behalf of the EEOC, see 41 CFR § 60–1.7 (a)(1), and much of the information contained in the AAP's is essentially in the nature of that protected by § 709. Compare 41 CFR pt. 60–2 with 42 U. S. C. § 2000e–8 (c) (1970 ed., Supp. III). Indeed, certain policy considera-

tions underlying the regulations precluding release by the GSA of information contained in the AAP's are akin to those motivating the confidentiality implemented by § 709. Compare 41 CFR § 60–40.3 (a)(5) with *H. Kessler & Co., supra,* at 1150. In view of the foregoing, though some of the information involved here neither was obtained, nor is to be disclosed, by the EEOC, the congressional purpose of confidentiality, protected by criminal sanctions, is not to be lightly circumvented.

Despite these questions on the merits, there is the further question whether interim relief is necessary. Applicant will not suffer irreparable injury from disclosure of the documents because the District Court has entered a protective order permitting only attorneys for the Legal Aid Society to examine the assertedly privileged documents. Only one of the reasons advanced by the applicant may justify granting a stay despite the District Court's protective order, and it is meritless. Applicant contends that disclosure of the materials will enable Legal Aid to compel the GSA, by litigation, to conduct reviews for compliance with Executive Order No. 11246. This in turn will result in ineligibility of the affected contractors for federal contracts pending GSA review, an asserted denial of due process because the affected contractors will have no opportunity to defend the adequacy of their affirmative-action programs in the litigation between the GSA and Legal Aid. Applicant also asserts that this denial of due process causes the contractors irreparable injury. Apart from other serious difficulties with this argument, it is enough to note that the claimed irreparable injury is far from imminent since the GSA has yet to indicate that it will undertake a compliance review and the District Court has entered no order to that effect. Since applicant fails to show any imminent harm, on further study and consideration, I have decided to deny the stay.

WHALEN, COMMISSIONER OF HEALTH OF NEW YORK *v.* ROE ET AL.

ON APPLICATION FOR STAY

No. A–368. Decided October 28, 1975

Application for stay of a three-judge District Court's judgment declaring unconstitutional provisions of New York Public Health Law requiring names and addresses of patients receiving certain prescription drugs to be reported to applicant Commissioner of Health, and enjoining enforcement of those provisions and acceptance of incoming prescriptions disclosing patients' identities, is denied, no showing having been made that applicant would suffer irreparable injury as a result of the denial of a stay.

See: 403 F. Supp. 931.

MR. JUSTICE MARSHALL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Southern District of New York. The applicant, the Commissioner of Health of the State of New York, has been enjoined by the three-judge court from enforcing certain provisions of New York's Public Health Law (Law). Respondents are various physicians, organizations of physicians, and patients in the State of New York who successfully brought suit to have those provisions declared unconstitutional.

The provisions at stake are those parts of §§ 3331 (6), 3332 (2)(a), and 3334 (4) of the Law (Supp. 1974) that require the name and address of each patient receiving a Schedule II controlled substance to be reported to the applicant. Schedule II drugs are those that have a high potential for abuse, but also have an accepted medical use. They include opiates and amphetamines. Under the Law, a doctor prescribing a Schedule II drug does so on a special serially numbered triplicate prescription

form. One copy is retained by the doctor, a second goes to the pharmacist (if applicable), and the last copy goes to the applicant, who transfers the data, including the name and address of the patient, from the prescription to a centralized computer file.

Respondents brought this action shortly after the effective date of the computerization program, alleging violations of their constitutional rights under 42 U. S. C. § 1983 and grounding jurisdiction on 28 U. S. C. § 1343 (3). Specifically, respondents claimed that mandatory disclosure of the name of a patient receiving Schedule II drugs violated the patient's right of privacy and interfered with the doctor's right to prescribe treatment for his patient solely on the basis of medical considerations. A three-judge court was convened. *Roe* v. *Ingraham*, 480 F. 2d 102 (CA2 1973).

At trial, various respondents testified that they were inhibited from using or prescribing Schedule II drugs they otherwise found beneficial because of a reluctance to disclose their or their patients' identities to the State. While questioning respondents' standing to sue, the applicant asserted that knowledge of patients' names was necessary to enable the computer system to detect drug abuse. When put to its proof by respondents, however, the applicant eventually conceded that the names and addresses of patients were useful in detecting only one abuse: patients who go from doctor to doctor (using the same name on each visit) in order to obtain an excessive supply of drugs. Thereupon respondents showed that in 15 months of operation the computer system had located only one suspected "doctor-shopper" while processing over 125,000 prescriptions per month. Thus respondents contended that the centralization of patients' names and addresses served no compelling state interest sufficient to offset the asserted invasion of privacy.

The three-judge court accepted respondents' arguments. The court read our decisions in *Roe* v. *Wade,* 410 U. S. 113 (1973), and *Doe* v. *Bolton,* 410 U. S. 179 (1973), as placing the doctor-patient relationship among those zones of privacy accorded constitutional protection. While noting that *Roe* and *Doe* concerned the most intimate of personal relations, sexual intimacy and the decision to bear a child, the court refused to hold the doctor-patient relationship constitutionally protected only when matters of childbearing were at stake. Rather, it noted the intimate nature of a patient's concern about his bodily ills and the medication he takes, and held that these matters, too, are protected by the constitutional right to privacy. While reaching this conclusion primarily on the basis of *Roe* and *Doe,* the court drew some support from the concurring and dissenting opinions in *California Bankers Assn.* v. *Shultz,* 416 U. S. 21, 78 (1974) (POWELL, J., concurring); *id.,* at 79 (DOUGLAS, J., dissenting); *id.,* at 91 (BRENNAN, J., dissenting); *id.,* at 93 (MARSHALL, J., dissenting); which it read as indicating that a majority of this Court would accord constitutional protection, at least against a wholesale reporting requirement, to all "intimate areas of an individual's personal affairs." *Id.,* at 78 (POWELL, J., concurring). Upon finding that respondents had a protected privacy interest in the medication they received, the court balanced that interest against the State's need for patients' names, and concluded that, with one suspect uncovered over 15 months, the need shown was ephemeral. "The diminution of a constitutionally guaranteed freedom is too great a price to pay for such a small governmental yield." *Roe* v. *Ingraham,* 403 F. Supp. 931, 937 (SDNY 1975) (footnote omitted).

Finding those portions of the Law that demanded disclosure of patients' names and addresses to the State to

be unconstitutional on the facts, the court enjoined the State from enforcing those provisions and from accepting for filing prescriptions or other documents disclosing the identities of patients receiving Schedule II drugs. The court also ordered the destruction of any name-bearing prescription forms in the State's possession and the expungement of names from all computer records. The court stayed the destruction and expungement order pending disposition of the case by this Court; it refused, however, to stay its declaration of unconstitutionality and its injunction against enforcement of the provisions and acceptance of incoming prescriptions.

Thus the application for stay now before me concerns only those matters the District Court refused to stay. The principles that govern a Circuit Justice's in-chambers review of stay applications are well known. A single Justice will grant a stay only in extraordinary circumstances. Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant both on the merits and on the need for a stay, is presumptively correct. To prevail here the applicant must meet a heavy burden of showing not only that the judgment of the lower court was erroneous on the merits, but also that the applicant will suffer irreparable injury if the judgment is not stayed pending his appeal.

MR. JUSTICE POWELL has succinctly stated the considerations pertinent to evaluating these two factors:

> "As a threshold consideration, Justices of this Court have consistently required that there be a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahan* v. *Howell*, 404 U. S. 1201, 1202; *Organized Village of Kake* v. *Egan*, 80 S. Ct. 33, 4 L. Ed.

> 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves* v. *Barnes,* 405 U. S. 1201, 1203–1204 (1972) (POWELL, J., in chambers).

See also *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 409 U. S. 1207, 1218 (1972) (BURGER, C. J., in chambers); *Railway Express Agency* v. *United States,* 82 S. Ct. 466, 468, 7 L. Ed. 2d 432, 434 (1962) (Harlan, J., in chambers); *United Fuel Gas Co.* v. *Public Service Comm'n,* 278 U. S. 322, 326 (1929).

Applying these standards to the application before me, I conclude a stay should not be granted. The three-judge court gave careful consideration to applicant's motion for a stay and, indeed, granted one insofar as it deemed necessary to prevent irreparable harm to applicant's interests. Applicant has shown nothing to persuade me the lower court erred. If applicant's position is sustained on appeal, all the data it is precluded from processing by the District Court's order will be readily available from the State's doctors and pharmacists, who are required by law to retain the complete prescription form for five years. The information now denied the State's computers can thus be located and tabulated at a later date. While the State may suffer delay in the complete implementation of its computerization program, delay alone is not, on these facts, irreparable injury.

I conclude that applicant would suffer no irreparable

injury if a stay is denied. This conclusion necessarily decides the application and renders unnecessary consideration of the possibility, since this case involves an appeal as of right, that applicant will be able to convince five Justices to reverse the three-judge court. I do note, however, that the right to privacy is a sensitive and developing area of the law and that the three-judge court did not apply it in a manner plainly inconsistent with our decisions. Likewise, the court's conclusion that respondents had standing seems in accord with the liberal standing decisions of this Court. Of course, this conclusion and my denial of a stay on the papers now before me are not to be taken as a reflection of my views on the merits of this case, or as an indication of the ultimate disposition of the case in this Court.

The application is denied.

NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE

ON APPLICATION FOR STAY

No. A–426. Decided November 13, 1975

Action by MR. JUSTICE BLACKMUN, as Circuit Justice, on application by Nebraska news media for stay of a state-court order restricting news coverage of alleged murders and criminal proceedings in prosecution thereof deferred pending prompt decision on the application by the Nebraska Supreme Court, which had "continued" the matter until it was known whether MR. JUSTICE BLACKMUN would act.

MR. JUSTICE BLACKMUN, Circuit Justice.

This is an application for stay of an order of the District Court of Lincoln County, Neb., that restricts coverage by the media of details concerning alleged sexual assaults upon and murders of six members of a family in their home in Sutherland, Neb.; concerning the investigation and development of the case against the accused; and concerning the forthcoming trial of the accused. The applicants are Nebraska newspaper publishers, national newswire services, media associations, a radio station, and employees of these entities.

The accused is the subject of a complaint filed in the County Court of Lincoln County, Neb., on October 19, 1975. The complaint was amended on October 22 and, as so amended, charged the accused with having perpetrated the assaults and murders on October 18. On October 21, the prosecution filed with the County Court a motion for a restrictive order. This motion alleged "a reasonable lik[e]lihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is

reported to the public." The defense joined in the prosecution's request, and also moved that the preliminary hearing be closed to the public and the press.

Refusing the latter request, the County Court held an open preliminary hearing on October 22. On that day it bound the accused over to the District Court. It, however, did issue a protective order. The court found that there was "a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury." The court then ordered that no party to the action, no attorney connected with the defense or prosecution, no judicial officer or employee, and no witness or "any other person present in Court" was to "release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing." It went on to order that no "news media disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation." Excepted, however, were (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance and text of the charge; (4) quotations from, or any reference without comment to, public records or communications theretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the pre-

liminary hearing proceedings was to be made available to the public at the expiration of the order.

A copy of the Bar-Press Guidelines was attached to the court's order and was incorporated in it by reference. In their preamble the Guidelines are described as a "voluntary code." They speak of what is "generally" appropriate or inappropriate for the press to disclose or report. The identity of the defendant, and also the victim, may be reported, along with biographical information about them. The circumstances of the arrest may be disclosed, as may the evidence against the defendant, "if, in view of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial." Confessions or other statements of the accused may not be disclosed, unless they have been made "to representatives of the news media or to the public." Also barred from disclosure are opinions as to the guilt of the accused, predictions of the outcome of trial, results of examinations and tests, statements concerning the anticipated testimony of witnesses, and statements made in court but out of the presence of the jury "which, if reported, would likely interfere with a fair trial." The media are instructed by the Guidelines that the reporting of an accused's prior criminal record "should be considered very carefully" and "should generally be avoided." Photographs are permissible provided they do not "deliberately pose a person in custody."

The applicants forthwith applied to the District Court of Lincoln County for vacation of the County Court's order. The defense, in turn, moved for continuation of the order and that all future proceedings in the case be closed. The respondent, as judge of the District Court, granted a motion by the applicants to intervene in the case. On October 27 he terminated the County Court's order and substituted his own. By its order of that

date the District Court found that "there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial." It ordered that the pretrial publicity in the case be in accord with the above-mentioned Guidelines as "clarified by the court." The clarification provisions were to the effect that the trial of the case commences when a jury is impaneled and that all reporting prior to that event would be pretrial publicity; that it appeared that the defendant had made a statement or confession "and it is inappropriate to report the existence of such statement or the contents of it"; that it appeared that the defendant may have made statements against interest to three named persons and may have left a note; that "the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported"; that the testimony of the pathologist witness "dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported"; that "the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported"; that the "exact nature of the limitations of publicity as entered by this order will not be reported," that is to say, "the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

The applicants then sought from the District Court a stay of its order. Not receiving relief there, they applied to the Supreme Court of Nebraska for an immediate

stay and also for leave to commence an original action in the nature of mandamus and/or prohibition to vacate the District Court order of October 27. On November 4, counsel for the applicants was advised by the Clerk of the Supreme Court that under that court's rules "all motions must be noticed for a day certain when the court is regularly in session," and that the "next date for submission of such a matter will be Monday, December 1, 1975, and I suggest that your motion be noticed for that date."

On November 5, the applicants, reciting that the "District Court and the Nebraska Supreme Court have declined to act on the requested relief," filed with this Court, directed to me as Circuit Justice, the present application for stay of the order of the District Court in and for Lincoln County, Neb. Because of the obvious importance of the issue and the need for immediate action, and because of the apparent similarity of the facts to those that confronted MR. JUSTICE POWELL as Circuit Justice, in the case of *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U. S. 1301 (1974), I asked for prompt responses. That request has been honored and responses respectively were received on November 10 and 11 from the Attorney General of Nebraska on behalf of the respondent judge, from the Lincoln County attorney on behalf of the State, and from counsel for the accused.

I was advised yesterday, however, that on November 10 the Supreme Court of Nebraska issued a *per curiam* statement reciting that the applicants have petitioned that court for leave to file their petition for a writ of mandamus or other appropriate relief with respect to the District Court order of October 27, and further reciting that during that court's "consideration of the application and the request for stay of the order, we are reliably informed that the relators have filed with the Supreme

Court of the United States an application or a request that that court act to accomplish the same purposes to be accomplished by their request to us to exercise our original jurisdiction," and then providing:

> "The existence of the two concurrent applications could put this court in the position of exercising parallel jurisdiction with the Supreme Court of the United States. We deem this inadvisable. Accordingly, the matter is continued until the Supreme Court of the United States has made known whether or not it will accept jurisdiction in the matter."

The issue raised is one that centers upon cherished First and Fourteenth Amendment values. Just as MR. JUSTICE POWELL observed in *Times-Picayune*, 419 U. S., at 1305, the case "presents a fundamental confrontation between the competing values of free press and fair trial, with significant public and private interests balanced on both sides." The order in question obviously imposes significant prior restraints on media reporting. It therefore comes to me " 'bearing a heavy presumption against its constitutional validity.' " *New York Times Co.* v. *United States*, 403 U. S 713, 714 (1971). But we have also observed that the media may be prohibited from publishing information about trials if the restriction is "necessary to assure a defendant a fair trial before an impartial tribunal." *Branzburg* v. *Hayes*, 408 U. S. 665, 685 (1972). See *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U. S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U. S. 997 (1975).

It is apparent, therefore, that if no action on the applicants' application to the Supreme Court of Nebraska could be anticipated before December 1, as the above-described communication from that court's clerk intimated, a definitive decision by the State's highest

court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly assert. Under those circumstances, I would not hesitate promptly to act.

It appears to me, however, from the Nebraska court's *per curiam* statement that it was already considering the applicants' application and request for stay that had been submitted to that tribunal. That court deferred decision, it says, because of the pendency of the similar application before me, and because it deemed inadvisable simultaneous consideration of the respective applications in Nebraska and here in Washington. Accordingly, the matter was "continued" until it was known whether I would act.

It is highly desirable, of course, that the issue, concerning, as it does, an order by a Nebraska state court, should be decided in the first instance by the Supreme Court of Nebraska, and that the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty. The application, after all, was submitted to me on the assumption that action by the Nebraska court would not be forthcoming until after a submission to be scheduled no earlier than December 1 and on the further assumption that the District Court's order satisfied the requirements of 28 U. S. C. § 1257. On the expectation, which I think is now clear and appropriate for me to have, that the Supreme Court of Nebraska, forthwith and without delay will entertain the applicants' application made to it, and will promptly decide it in the full consciousness that "time is of the essence,"

I hereby give the Supreme Court of Nebraska that assurance it desired that, at least for the immediate present, I neither issue nor finally deny a stay on the papers before me. My inaction, of course, is without prejudice to the applicants to reapply to me should prompt action not be forthcoming.

NEBRASKA PRESS ASSN. ET AL. *v.* STUART, JUDGE

ON REAPPLICATION FOR STAY

No. A–426. Decided November 20, 1975

1. A Circuit Justice has jurisdiction to act upon a State's highest court's decision that an apparently unconstitutional restraint of the press imposed by a trial court's order should remain in effect pending review thereof, the Circuit Justice having deferred action on an application for a stay of such order pending the State's highest court's prompt decision thereon, and a reasonable time in which to review such restraint having passed.
2. Reapplication by news media for stay of a state-court order restricting news coverage of alleged murders and criminal proceedings in prosecution thereof, is granted as to the portions of such order (a) incorporating the media's voluntary guidelines for reporting such news, (b) prohibiting the reporting of the details of the crimes, of the victims' identities, and of the pathologist's testimony at the open preliminary hearing, and (c) restricting the reporting of the limitations on publicity imposed by the order, but only to the extent the publicity itself is now permitted. Stay is not granted as to restraints on publication prior to trial of certain facts that strongly implicate an accused, such as a confession, and the stay granted here does not affect those portions of the order governing the taking of photographs and other media activity in the courthouse; nor does it bar the trial judge from restricting what the parties and officers of the court may say to any media representative.

MR. JUSTICE BLACKMUN, Circuit Justice.

An application for stay of the order dated October 27, 1975, of the District Court of Lincoln County, Neb., resulted in my issuance of an in-chambers opinion, as Circuit Justice, on November 13. In that opinion I indicated that the issue raised is one that centers upon cherished First and Fourteenth Amendment values; that the challenged state-court order obviously imposes significant prior restraints on media reporting; that it therefore

came to me " 'bearing a heavy presumption against its constitutional validity,' " *New York Times Co.* v. *United States,* 403 U. S. 713, 714 (1971); that if no action on the application to the Supreme Court of Nebraska could be anticipated before December 1, there would be a delay "for a period so long that the very day-by-day duration of that delay would constitute and aggravate a deprival of such constitutional rights, if any, that the applicants possess and may properly assert"; that, however, it was highly desirable that the issue should be decided in the first instance by the Supreme Court of Nebraska; and that "the pendency of the application before me should not be deemed to stultify that court in the performance of its appropriate constitutional duty." I stated my expectation that the Supreme Court of Nebraska would entertain, "forthwith and without delay," the application pending before it, and would "promptly decide it in the full consciousness that 'time is of the essence.' " I refrained from either issuing or finally denying a stay on the papers before me. That, however, was without prejudice to the applicants to reapply to me should prompt action not be forthcoming. The applicants have now renewed their application for a stay.

One full week has elapsed since my in-chambers opinion was filed. No action has been taken by the Supreme Court of Nebraska during that week. The clerk of that court has stated, however, that the applicants have been allowed to docket their original application by way of mandamus to stay the order of the District Court of Lincoln County, and that the matter is set for hearing before the Supreme Court of Nebraska on November 25.

Whether the Nebraska court will reach a definitive decision on November 25, or very shortly thereafter, I do not know. Obviously at least 12 days will have elapsed, without action, since the filing of my in-chambers

opinion, and more than four weeks since the entry of the District Court's restrictive order. I have concluded that this exceeds tolerable limits. Accordingly, subject to further order of this Court, and subject to such refining action as the Supreme Court of Nebraska may ultimately take on the application pending before it, I issue a partial stay.

A question is initially raised as to my power and jurisdiction to grant a stay. As a single Justice, I clearly have the authority to grant a stay of a state court's "final judgment or decree" that is subject to review by this Court on writ of certiorari. 28 U. S. C. §§ 2101 (f) and 1257 (3). Respondents to the application for a stay have objected that there is no such "final judgment or decree" upon which I may act. The issue is not without difficulty, for the Supreme Court of Nebraska gives promise of reviewing the District Court's decision, and in that sense the lower court's judgment is not one of the State's highest court, nor is its decision the final one in the matter. Where, however, a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment. The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable. By deferring action until November 25, and possibly later, the Supreme Court of Nebraska has decided, and, so far as the intervening days are concerned, has finally decided, that this restraint on the media will persist. In this sense, delay itself is a final decision. I need not now hold that in any area outside that of prior restraint on the press, such delay would warrant a stay or even be a violation of federal rights. Yet neither can I accept that this Court, or any individual Justice thereof, is

powerless to act upon the failure of a State's highest court to lift what appears to be, at least in part, an unconstitutional restraint of the press. When a reasonable time in which to review the restraint has passed, as here, we may properly regard the state court as having finally decided that the restraint should remain in effect during the period of delay. I therefore conclude that I have jurisdiction to act upon that state-court decision.

I shall not repeat the facts of the case. They were set forth in my in-chambers opinion of November 13. Neither shall I pause again to elaborate on this Court's acute sensitivity to the vital and conflicting interests that are at stake here. There is no easy accommodation of those interests, and it certainly is not a task that one prefers to take up without the benefit of the participation of all Members of the Court. Still, the likelihood of irreparable injury to First Amendment interests requires me to act. When such irreparable injury is threatened, and it appears that there is a significant possibility that this Court would grant plenary review and reverse, at least in part, the lower court's decision, a stay may issue. *Times-Picayune Pub. Corp.* v. *Schulingkamp,* 419 U. S. 1301, 1305 (1974). Taking this approach to the facts before me, I grant the requested stay to the following extent:

1. The most troublesome aspect of the District Court's restrictive order is its wholesale incorporation of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation. Without rehearsing the description of those Guidelines set forth in my prior opinion, it is evident that they constitute a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague. To cite

only one example, they state that the publication of an accused's criminal record "should be considered very carefully" and "should generally be avoided." These phrases do not provide the substance of a permissible court order in the First Amendment area. If a member of the press is to go to jail for reporting news in violation of a court order, it is essential that he disobey a more definite and precise command than one that he consider his act "very carefully." Other parts of the incorporated Guidelines are less vague and indefinite. I find them on the whole, however, sufficiently riddled with vague and indefinite admonitions—understandably so in view of the basic nature of "guidelines"—that I have concluded that the best and momentary course is to stay their mandatory and wholesale imposition in the present context. The state courts, nonetheless, are free forthwith to reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order. That portion of the restrictive order that generally incorporates the Guidelines is hereby stayed.

2. No persuasive justification has been advanced for those parts of the restrictive order that prohibit the reporting of the details of the crimes, of the identities of the victims, or of the testimony of the pathologist at the preliminary hearing that was open to the public. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469, 487–497 (1975). These facts in themselves do not implicate a particular putative defendant. To be sure, the publication of the facts may disturb the community in which the crimes took place and in which the accused, presumably, is to be tried. And their public knowledge may serve to strengthen the resolve of citizens, when so informed, who will be the accused's prospective jurors,

that someone should be convicted for the offenses. But until the bare facts concerning the crimes are related to a particular accused, it does not seem to me that their being reported in the media irreparably infringes the accused's right to a fair trial of the issue as to whether he was the one who committed the crimes. There is no necessary implication of the person, who has been named as the accused, in the facts suppressed by paragraphs 4 and 5 of the District Court's restrictive order, and to that extent the order is hereby stayed.

3. At the same time I cannot, and do not, at least on an application for a stay and at this distance, impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial. Restraints of this kind are not necessarily and in all cases invalid. See *Branzburg* v. *Hayes*, 408 U. S. 665, 685 (1972); *Times-Picayune Pub. Corp.* v. *Schulingkamp*, 419 U. S., at 1307; *Newspapers, Inc.* v. *Blackwell*, 421 U. S. 997 (1975). I am particularly conscious of the fact that the District Court's order applies only to the period prior to the impaneling, and presumably the sequestration, of a jury at the forthcoming trial. Most of our cases protecting the press from restrictions on what they may report concern the trial phase of the criminal prosecution, a time when the jurors and witnesses can be otherwise shielded from prejudicial publicity, and also a time when both sides are being heard. See, *e. g.*, *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1941). Restrictions limited to pretrial publicity may delay media coverage—and, as I have said, delay itself may be impermissible—but at least they do no more than that.

I therefore conclude that certain facts that strongly implicate an accused may be restrained from publication

by the media prior to his trial. A confession or statement against interest is the paradigm. See *Rideau* v. *Louisiana,* 373 U. S. 723 (1963); *Irvin* v. *Dowd,* 366 U. S. 717 (1961). A prospective juror who has read or heard of the confession or statement repeatedly in the news may well be unable to form an independent judgment as to guilt or innocence from the evidence adduced at trial. In the present case, there may be other facts that are strongly implicative of the accused, as, for example, those associated with the circumstances of his arrest. There also may be facts that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one. Certain statements as to the accused's guilt by those associated with the prosecution might also be prejudicial. There is no litmus paper test available. Yet some accommodation of the conflicting interests must be reached. The governing principle is that the press, in general, is to be free and unrestrained and that the facts are presumed to be in the public domain. The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt. Of course, if a change of venue will not allow the selection of a jury that will have been beyond the reach of the expected publicity, that also is a factor.

4. Paragraph 6 of the restrictive order also prohibits disclosure of the "exact nature of the limitations" that it imposes on publicity. Since some of those limitations are hereby stayed, the restrictions on the reporting of those limitations are stayed to the same extent. Inasmuch as there is no point in prohibiting the reporting of a confession if it may be reported that one has been made but may not be spoken of, the provision in para-

graph 6 that the restriction on reporting confessions may itself not be disclosed is not stayed.

5. To the extent, if any, that the District Court's order prohibits the reporting of the pending application to the Supreme Court of Nebraska, and to the extent, if any, that the order prohibits the reporting of the facts of the filing of my in-chambers opinion of November 13, or of this opinion (other than those parts of the opinions that include facts properly suppressed), the restrictive order is also stayed.

6. Nothing herein affects those portions of the restrictive order governing the taking of photographs and other media activity in the Lincoln County courthouse. Neither is it to be deemed as barring what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media.

The District Court and the Supreme Court of Nebraska obviously are closer than I am to the facts of the crimes, to the pressures that attend them, and to the consequences of community opinion that have arisen since the commission of the offenses. The Supreme Court of Nebraska, accordingly, is in a better position to evaluate the details of the restrictive order. It may well conclude that other portions of that order are also to be stayed or vacated. I have touched only upon what appear to me to be the most obvious features that require resolution immediately and without one moment's further delay.

PASADENA CITY BOARD OF EDUCATION ET AL. *v.* SPANGLER ET AL.

ON APPLICATION FOR STAY

No. A–538. Decided December 22, 1975

Application to stay, pending disposition of appeal by Court of Appeals, the District Court's order enjoining applicant school board members' creation of a "fundamental school" is granted, where certiorari has been granted in applicants' related petition presenting the issue whether the District Court still had control over the unitary school system which has been in compliance with that court's desegregation decree for four years.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicants, members of the Pasadena City Board of Education, have presented to me as Circuit Justice a request to stay an order entered by the United States District Court for the Central District of California pending disposition of their appeal to the Court of Appeals for the Ninth Circuit. After two interim stays by single judges of the Court of Appeals, a panel of that court denied a further stay on December 2, 1975, but ordered expedited argument.

The District Court, in its ruling which applicants seek to stay, overturned applicants' action in establishing one of two "fundamental schools" in the summer of 1975. It ruled that the burden was on applicants to prove that their action did not result in resegregation. Finding that applicants had not met this burden, the court enjoined the creation of the new school and ordered its students returned to their previously assigned classrooms. The result of the District Court's order and the subsequent stay rulings of the Court of Appeals is that if I decline to stay the order there will be at least some disruption of the school system in the middle of a school year.

Ordinarily a stay application to a Circuit Justice on a matter currently before a court of appeals is rarely granted, and were it not for the fact that this Court on November 11, 1975, granted certiorari on a related petition of applicants, *Pasadena City Board of Education* v. *Spangler*, No. 75–164, *ante*, p. 945, I would deny this application. But one of the issues presented in No. 75–164, is whether "a unitary school system which has been in compliance with a school desegregation decree for four years remain[s] subject indefinitely to the control of the trial court which entered the decree." In my opinion, should this Court reverse or significantly modify the conclusion of the Court of Appeals for the Ninth Circuit with respect to the above-quoted "question presented" in No. 75–164, there would be serious doubt as to the correctness of the order of the District Court which applicants now seek to stay.

Because under my analysis the critical event will not be the decision of the Court of Appeals on applicants' presently pending appeal, but rather the disposition by this Court of No. 75–164, IT IS ORDERED that the order of the District Court in this case entered on October 8, 1975, is stayed pending disposition of No. 75–164 by this Court.

Application granted.

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Privilege against self-incrimination—Miranda warnings—Admissibility in evidence of incriminating statement.—Where respondent, who had been arrested in connection with certain robberies, was given *Miranda* warnings and declined to discuss robberies, whereupon detective ceased interrogation, but more than two hours later, after giving *Miranda* warnings, another detective questioned respondent solely about an unrelated murder and respondent made an inculpatory statement, admission in evidence of such statement at respondent's murder trial did not violate *Miranda* principles. Respondent's right to cut off questioning was scrupulously honored, police having immediately ceased robbery interrogation after respondent's refusal to answer and having commenced questioning about murder only after a significant time lapse and after a fresh set of warnings had been given respondent. Michigan v. Mosley, p. 96.

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2. *Searches and seizures—Warrantless search of automobile—Probable cause.*—Where police officers had probable cause to search respondent's automobile at scene immediately after arresting him for attempting to pass fraudulent checks at a bank drive-in window, such probable cause still obtained shortly thereafter at station house to which automobile had been taken so that officers could constitutionally search automobile there without a warrant; hence incriminating checks seized during search were admissible in evidence at respondent's trial. Texas v. White, p. 67.

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CONTROLLED SUBSTANCES ACT—Continued.
addicts) for patients without giving them adequate physical examinations or specific instructions for its use and charged fees according to quantity of methadone prescribed rather than fees for medical services rendered. United States v. Moore, p. 122.

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2. *Refusal to testify before grand jury—Guilty plea—Double jeopardy.*—Petitioner's guilty plea to a charge of refusal to answer question before a grand jury after having been granted immunity did not bar his claim that Double Jeopardy Clause precluded State from haling him into court on that charge after he had been sentenced to a jail term for contempt of court for his failure to testify before grand jury. Menna v. New York, p. 61.

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2. *Measure of forfeitures—Subcontractor.*—A correct application of language of Act (which provides that Government may recover from a person who presents a false claim or causes a false claim to be presented to it a forfeiture of $2,000) requires that focus in each case be upon specific conduct of person from whom Government seeks to collect forfeiture. Thus, here subcontractor committed three acts that caused prime contractor to submit false claims to Government—three separately invoiced shipments of falsely branded electron tubes to prime contractor—and hence is liable for three $2,000 forfeitures representing those three shipments. United States v. Bornstein, p. 303.

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969.

1. *Penalties—Necessity for findings of fact.*—Language of § 109 (a)(3) of Act requiring Secretary of Interior to assess a civil monetary penalty against a coal mine operator for each violation of mandatory health and safety standards prescribed by Act and other provisions, especially when read in light of its legislative history, requires Secretary to make formal findings of fact as a predicate for

FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969—Continued.

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2. *Penalties—Necessity for findings of fact.*—Section 109(a)(3) of Act requiring Secretary of Interior to assess a civil monetary penalty against a coal mine operator for each violation of mandatory health and safety standards prescribed by Act and other provisions, does not compel Secretary to support each penalty assessment order with express findings of fact concerning violation and amount of penalty, absent a request by mine operator for an administrative hearing. Kleppe v. Delta Mining, Inc., p. 403.

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2. *Local police matters—Federal-court intrusion.*—In class actions under 42 U. S. C. § 1983 against petitioners (Mayor of Philadelphia, Police Commissioner, and others) alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens in particular and Philadelphia residents in general, District Court's judgment directing petitioners to draft for court's approval "a comprehensive program for dealing adequately with civilian complaints" to be formulated in accordance with court's "guidelines" containing detailed suggestions for revising police manuals and procedural rules for dealing with citizens and for changing procedures for handling complaints, constitutes an unwarranted federal judicial intrusion into petitioners' discretionary authority to perform their official functions as prescribed by state and local law, and by validating type of litigation and granting type of relief involved here, lower courts have exceeded their authority under § 1983. Rizzo v. Goode, p. 362.

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GUN CONTROL ACT OF 1968—Continued.

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INDEMNIFICATION AGREEMENTS BETWEEN MOTOR CARRIERS. See **Carriers.**

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INELIGIBILITY FOR UNEMPLOYMENT COMPENSATION. See **Constitutional Law**, II, 3.

INJUNCTIONS. See **Federal-State Relations**, 2; **Stays**, 6.

INSIDER TRANSACTIONS. See **Securities Exchange Act of 1934.**

INSOLVENT DEBTORS. See **United States.**

INTERIOR SECRETARY. See **Federal Coal Mine Health and Safety Act of 1969.**

INTERNAL REVENUE CODE.

1. *Jeopardy termination—Deficiency.*—Under statutory definition of "deficiency" in § 6211 (a) of Code as being amount of tax imposed less any amount that may have been reported by taxpayer on his return, tax owing and unreported after jeopardy termination

INTERNAL REVENUE CODE—Continued.

under § 6851, which in these cases, as in most § 6851 terminations, is full tax due, is clearly a deficiency, there being nothing in definition to suggest that a deficiency can arise only at conclusion of a 12-month taxable year and it being sufficient that taxable period in question has come to an end and tax in question is due and unreported. Laing v. United States, p. 161.

2. *Jeopardy termination—Deficiency—Assessment and collection procedures—Anti-Injunction Act.*—Based on plain language of statutory provisions at issue, their place in legislative scheme, and their legislative history, income tax owing, but not reported, at time of a jeopardy termination under § 6851 of Code is a deficiency whose assessment and collection are subject to procedures of § 6861 *et seq.*, and hence because District Director in each case failed to comply with these requirements, taxpayers' suits for injunctive relief were not barred by Anti-Injunction Act. Laing v. United States, p. 161.

INTERNAL REVENUE SERVICE. See **Appeals.**

INTERROGATIONS BY POLICE. See **Constitutional Law,** III.

INTERSTATE COMMERCE COMMISSION REGULATIONS. See **Carriers.**

INTRASTATE PURCHASES OF FIREARMS. See **Gun Control Act of 1968.**

IRREPARABLE INJURY. See **Stays,** 4, 7.

JEOPARDY TERMINATIONS. See **Internal Revenue Code.**

JUDICIAL REVIEW. See also **Certiorari; Federal Coal Mine Health and Safety Act of 1969,** 3–4; **Federal Magistrates Act.**

1. *Court of Appeals—Atomic Energy Commission Licensing and Appeal Boards—Construction permit—Nuclear plant.*—Court of Appeals erred in setting aside AEC Licensing and Appeal Boards' approval of a construction permit for a commercial nuclear powered electric generating plant on ground that Boards failed to follow AEC's own regulations governing minimum allowable "population center distance" in nuclear plant siting. Where, even if meaning is not free from doubt, AEC's reliance upon actual boundaries of population density, rather than upon political boundaries, in its interpretation of regulations sensibly conforms to purpose and wording of regulations and comports with prior agency decisions, Court of Appeals was obligated to regard such a reasonable administrative interpretation as controlling. Northern Ind. Pub. Serv. Co. v. Walton League, p. 12.

JUDICIAL REVIEW—Continued.

2. *Court of Appeals—Federal Power Commission—Natural gas curtailment plan.*—An actual natural gas shortage is a necessary predicate to FPC's assertion of authority under its transportation jurisdiction to approve curtailment of gas already contracted for, and Court of Appeals could properly conclude that FPC would have abused its discretion had it approved curtailment plans absent evidence whereby it "could have reasonably believed" shortage to exist, and that "substantial evidence" in record is necessary to support any such finding. FPC v. Transcontinental Pipe Line Corp., p. 326.

3. *Court of Appeals—Federal Power Commission—Natural gas curtailment plan—Order directing gas shortage investigation.*—In action for review of FPC order rejecting proposed interim natural gas curtailment plan, Court of Appeals exceeded its reviewing authority in ordering gas shortage investigation, since § 19 (b) of Natural Gas Act providing for judicial review of FPC decisions contemplates a mode of review that considers only agency's decision and evidence on which it is based and not some new record initially made by reviewing court. If new evidence is needed, case must be remanded so that agency can decide in its discretion how best to develop needed data and how its prior decision should be modified in light thereof. FPC v. Transcontinental Gas Pipe Line Corp., p. 326.

JURISDICTION. See **Appeals; Certiorari; Supreme Court,** 12.

JURY TRIALS. See **Constitutional Law,** VI, 1.

JUSTICIABILITY. See **Constitutional Law,** I.

LEASE AGREEMENTS BETWEEN MOTOR CARRIERS. See **Carriers.**

LICENSED PHYSICIANS. See **Controlled Substances Act.**

MAGISTRATES. See **Federal Magistrates Act**

MAILING CONCEALABLE WEAPONS. See **Constitutional Law,** II, 1; **Criminal Law,** 1.

MANDAMUS. See also **Removal**

1. *Improper remand to state court—Remedy.*—Where District Court, to which diversity action had been removed, refused to adjudicate case and remanded it to state court on grounds not authorized by removal statutes, mandamus was proper remedy to compel District Court to entertain remanded action. Thermtron Products, Inc. v. Hermansdorfer, p. 336.

MANDAMUS—Continued.

2. *Review of remand to state court.*—Title 28 U. S. C. § 1447 (d) imposing a general bar against review of an order remanding a removed case to state court, when construed as it must be in conjunction with § 1447 (c) providing for remand on ground that case was removed "improvidently and without jurisdiction," does not bar appellate review by mandamus of a remand order made on grounds not specified in § 1447 (c), there being no indication either in language or legislative history of provision that Congress intended to extend bar against review to reach remand orders not based on statutory grounds. Thermtron Products, Inc. v. Hermansdorfer, p. 336.

MEDICARE. See **Federal Magistrates Act.**

METHADONE. See **Controlled Substances Act.**

MIRANDA WARNINGS. See **Constitutional Law,** III.

MISCONDUCT OF POLICE. See **Constitutional Law,** I; **Federal-State Relations,** 2.

MONETARY PENALTIES. See **Federal Coal Mine Health and Safety Act of 1969.**

MOOTNESS.

Parole eligibility—Constitutional claim.—Where respondent was paroled after Court of Appeals upheld his claim in his action against petitioner parole board members that he was constitutionally entitled to certain procedural rights in connection with petitioners' consideration of his eligibility for parole, case is moot and does not present an issue "capable of repetition, yet evading review," since action is not a class action and there is no demonstrated probability that respondent will again be subjected to parole system. Weinstein v. Bradford, p. 147.

MOTOR CARRIERS. See **Carriers.**

MURDER. See **Constitutional Law,** VI, 1; **Federal-State Relations.** 1.

NARCOTICS. See **Controlled Substances Act.**

NATURAL GAS ACT. See **Certiorari; Judicial Review,** 2–3.

NATURAL GAS SHORTAGES. See **Certiorari; Judicial Review,** 2–3.

NEBRASKA. See **Stays,** 1–2; **Supreme Court,** 12.

NEGLIGENCE OF MOTOR CARRIERS. See **Carriers.**

NEWS COVERAGE OF CRIMINAL PROCEEDINGS. See **Stays**, 1–2; **Supreme Court**, 12.

NEW YORK PUBLIC HEALTH LAW. See **Stays**, 7.

NONDISCRIMINATORY AD VALOREM PROPERTY TAXES. See **Constitutional Law**, V.

NONDISCRIMINATORY EMPLOYMENT PRACTICES. See **Stays**, 4.

NOTICE OF TAX DEFICIENCY. See **Internal Revenue Code.**

NUCLEAR POWERED GENERATING PLANTS. See **Judicial Review**, 1.

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PATIENTS' IDENTITIES. See **Stays**, 7.

PAYMENT OF WAGES. See **Seamen.**

PENALTIES. See **Federal Coal Mine Health and Safety Act of 1969**; **Seamen.**

PERSONAL INJURY ACTIONS. See **Conflict of Laws.**

PERSONAL STAKE IN OUTCOME. See **Constitutional Law**, I.

PHILADELPHIA. See **Constitutional Law**, I; **Federal-State Relations**, 2.

PHYSICIANS. See **Controlled Substances Act.**

POLICE INTERROGATIONS. See **Constitutional Law**, III.

POLICE MISCONDUCT. See **Constitutional Law**, I; **Federal-State Relations**, 2.

"POPULATION CENTER DISTANCE." See **Judicial Review**, 1.

POSSESSION OF STOLEN MAIL. See **Constitutional Law**, IV, 1, 3.

POSTAL OFFICERS. See **Constitutional Law**, IV, 1, 3.

PREGNANT WOMEN. See **Constitutional Law**, II, 3.

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PRESUMPTIONS. See **Constitutional Law**, II, 3.

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PROCEDURE. See also **Abstention; Conflict of Laws.**

Petitioner's death—Dismissal of certiorari.—Petitioner's death pending review by certiorari requires dismissal of petition. Dove v. United States, p. 325.

PROCEDURES FOR TAX ASSESSMENT AND COLLECTION. See **Internal Revenue Code.**

PROPERTY TAXES. See **Constitutional Law**, V.

PUBLIC EMPLOYEES. See **Abstention.**

PURCHASES OF FIREARMS. See **Gun Control Act of 1968.**

PURCHASES OF SECURITIES. See **Securities Exchange Act of 1934.**

RADIO KITS. See **False Claims Act.**

RECEIPT OF FIREARMS. See **Gun Control Act of 1968.**

REFERENCES TO MAGISTRATE. See **Federal Magistrates Act.**

REFUSAL OR NEGLECT TO PAY WAGES. See **Seamen.**

REFUSAL TO OBEY SUBPOENA. See **Appeals.**

REFUSAL TO TESTIFY BEFORE GRAND JURY. See **Criminal Law**, 2.

REGISTERED PHYSICIANS. See **Controlled Substances Act.**

REGULATIONS OF INTERSTATE COMMERCE COMMISSION. See **Carriers.**

REMAND TO STATE COURT. See **Mandamus; Removal.**

REMOVAL. See also **Mandamus.**

Remand to state court—Unauthorized grounds.—District Court, to which diversity action had been removed, exceeded its authority in remanding action to state court on grounds (heavy federal docket) not permitted by 28 U. S. C. § 1447(c), which provides for remand on ground that case was removed "improvidently and without jurisdiction." Thermtron Products, Inc. v. Hermansdorfer, p. 336.

RESTRICTING NEWS COVERAGE OF CRIMINAL PROCEEDINGS. See **Stays**, 1–2; **Supreme Court**, 12.

REVENUES FROM IMPOSTS AND DUTIES ON IMPORTS. See **Constitutional Law**, V.

RIGHT TO CUT OFF POLICE INTERROGATIONS. See **Constitutional Law**, III.

RIGHT TO JURY TRIAL. See **Constitutional Law**, VI, 1.

RIGHT TO PRETERMINATION HEARING. See **Abstention.**

RIGHT TO SILENCE. See **Constitutional Law**, III.

RIGHT TO SPEEDY TRIAL. See **Constitutional Law**, VI, 2.

RULES OF CIVIL PROCEDURE. See **Federal Magistrates Act.**

RULES OF CRIMINAL PROCEDURE. See **Stays**, 3.

SAFETY REGULATIONS OF INTERSTATE COMMERCE COMMISSION. See **Carriers.**

SALES OF FIREARMS. See **Gun Control Act of 1968.**

SALES OF SECURITIES. See **Securities Exchange Act of 1934.**

SAWED-OFF SHOTGUNS. See **Constitutional Law**, II, 1; **Criminal Law**, 1.

SCHOOLS. See **Stays**, 5–6.

SEAMEN.

Discharged seaman—Foreign port—Airline ticket to United States as payment of wages due.—Where, after a seaman was discharged for misconduct from petitioner's ship while it was docked in South Vietnam, petitioner purchased for him an airline ticket to the United States, being precluded by South Vietnamese currency regulations and other complications from paying him his wages due in American currency, transaction resulting in seaman's receipt of airline ticket purchased with money owed to him as wages constituted a payment of wages. Therefore there was no refusal or neglect to make payment, and hence no liability, under 46 U. S. C. § 596, which requires master or owner of a vessel making foreign voyages to pay a discharged seaman his wages within four days after discharge, and, upon refusal or neglect to make such payment without sufficient cause, to pay seaman a sum equal to two days' pay for every day during which payment is delayed. American Foreign S. S. Co. v. Matise, p. 150.

SEARCHES AND SEIZURES. See **Constitutional Law**, IV, 1–2.

SECRETARY OF HEALTH, EDUCATION, AND WELFARE. See **Federal Magistrates Act.**

SECRETARY OF THE INTERIOR. See **Federal Coal Mine Health and Safety Act of 1969.**

SECURITIES EXCHANGE ACT OF 1934.

Insider transactions—Recovery of profits—Beneficial owner "at the time of" purchase.—By virtue of exemptive provision of § 16 (b) of Act that § 16 (b) (which enables a corporation to recover for itself profits realized by an officer, director, or beneficial owner of more than 10% of its shares from a purchase and sale of its stock within a six-month period) shall not be construed to cover any transaction where beneficial owner was not such both "at the time of" purchase and sale of securities involved, a beneficial owner is accountable under § 16 (b) in a purchase-sale sequence such as was involved here only if he was such an owner "before the purchase." Thus fact that respondent was not a beneficial owner before purchase removed transaction from operation of § 16 (b). Foremost-McKesson v. Provident Securities, p. 232.

SELF-INCRIMINATION. See **Constitutional Law,** III.

SHORT-SWING SECURITIES TRANSACTIONS. See **Securities Exchange Act of 1934.**

SIXTH AMENDMENT. See **Constitutional Law,** VI.

SOCIAL SECURITY BENEFITS. See **Federal Magistrates Act.**

SOUTH VIETNAM. See **Seamen.**

SPEEDY TRIAL. See **Constitutional Law,** VI, 2.

STANDING TO SUE. See **Constitutional Law,** I.

STATE EMPLOYEES. See **Abstention.**

STATE PROSECUTORS. See **Stays,** 3.

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STAYS. See also **Supreme Court,** 12.

1. *Criminal proceedings—Order restricting news coverage.*—Action by MR. JUSTICE BLACKMUN, as Circuit Justice, on application by Nebraska news media for stay of a state-court order restricting news coverage of alleged murders and criminal proceedings in prosecution thereof deferred pending prompt decision on application by Nebraska Supreme Court, which had "continued" matter until it was known whether MR. JUSTICE BLACKMUN would act. Nebraska Press Assn. v. Stuart (BLACKMUN, J., in chambers), p. 1319.

STAYS—Continued.

2. *Criminal proceedings—Order restricting news coverage.*—Reapplication by news media for stay of a state-court order restricting news coverage of alleged murders and criminal proceedings in prosecution thereof, is granted as to portions of such order (a) incorporating media's voluntary guidelines for reporting such news, (b) prohibiting reporting details of crimes, of victims' identities, and of pathologist's testimony at open preliminary hearing, and (c) restricting reporting of limitations on publicity imposed by order, but only to extent publicity itself is now permitted. Stay is not granted as to restraints on publication prior to trial of certain facts that strongly implicate an accused, such as confession, and stay granted here does not affect those portions of order governing taking of photographs and other media activity in courthouse; nor does it bar trial judge from restricting what parties and officers of court may say to any media representative. Nebraska Press Assn. v. Stuart (BLACKMUN, J., in chambers), p. 1327.

3. *Federal grand jury records—Turnover order to state prosecutor.*—Application for stay of District Court's order that files and records of federal grand jury that indicted applicants be turned over to a state prosecutor contemplating state prosecution of applicants, is granted pending appeal. Smith v. United States (DOUGLAS, J., in chambers), p. 1303.

4. *Government contractors—Employment practices—Affirmative-action programs—Order requiring disclosure—No irreparable injury.*—Even though there is a substantial question whether information on file with General Services Administration reporting on Government contractors' affirmative-action programs to ensure nondiscriminatory employment practices, is privileged by virtue of § 709 (e) of Civil Rights Act of 1964, application for stay of District Court's order requiring GSA to disclose such information must be denied because applicant has failed to show that irreparable injury that allegedly would result from disclosure is imminent. Chamber of Commerce v. Legal Aid Society (DOUGLAS, J., in chambers), p. 1309.

5. *Improper dismissal of teachers—State judgment.*—Application for stay of Wisconsin Supreme Court judgment, holding on due process grounds that a school board may not properly dismiss teachers employed by it, denied, where it is not clear whether that judgment rested upon Fourteenth Amendment alone or also upon Wisconsin Constitution, and whether judgment was "final" for purposes of 28 U. S. C. § 1257. Hortonville Joint School Dist. v. Hortonville Ed. Assn. (REHNQUIST, J., in chambers), p. 1301.

STAYS—Continued.

6. *Injunction against "fundamental school."*—Application to stay, pending disposition of appeal by Court of Appeals, District Court's order enjoining applicant school board members' creation of a "fundamental school," is granted, where certiorari has been granted in applicant's related petition presenting issue whether District Court still had control over unitary school system which has been in compliance with that court's desegregation decree for four years. Pasadena Board of Education v. Spangler (REHNQUIST, J., in chambers), p. 1335.

7. *Law requiring disclosure of patients' identities—Judgment invalidating law—No irreparable injury.*—Application for stay of a three-judge District Court's judgment declaring unconstitutional provisions of New York Public Health Law requiring names and addresses of patients receiving certain prescription drugs to be reported to applicant Commissioner of Health, and enjoining enforcement of those provisions and acceptance of incoming prescriptions disclosing patients' identities, is denied, no showing having been made that applicant would suffer irreparable injury as a result of denial of a stay. Whalen v. Roe (MARSHALL, J., in chambers), p. 1313.

STOLEN MAIL. See **Constitutional Law**, IV, 1, 3.

STRICT CONSTRUCTION OF CRIMINAL STATUTES. See **Controlled Substances Act.**

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SUFFICIENT WARNING OF CRIMINAL OFFENSE. See **Constitutional Law**, II, 1, 4.

SUPREME COURT. See also **Certiorari; Procedure.**

1. Retirement of MR. JUSTICE DOUGLAS, p. VII.

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3. Allotment of Justices, pp. V, VI.

4. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Fifth Circuit, p. 906.

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9. Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 992.

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11. Assignments of Mr. Justice Clark (retired) to the United States Court of Appeals for the Second Circuit, p. 1026.

12. *Circuit Justice—Jurisdiction—State-court restraint of press.*—A Circuit Justice has jurisdiction to act upon a State's highest court's decision that an apparently unconstitutional restraint of press imposed by a trial court's order should remain in effect pending its review thereof, Circuit Justice having deferred action on an application for a stay of such order pending State's highest court's prompt decision thereon, and a reasonable time in which to review such restraint having passed. Nebraska Press Assn. v. Stuart (BLACKMUN, J., in chambers), p. 1327.

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TAXES. See **Constitutional Law,** V; **Internal Revenue Code.**

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Government contracts—Default—Insolvent debtor—Priority of "debts due to the United States."—Obligations of an insolvent debtor arising from default in performance of Government contracts, occurring before an assignment for benefit of creditors, are entitled to

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statutory priority accorded "debts due to the United States" under 31 U. S. C. § 191, even though obligations were unliquidated in amount at time of assignment. United States v. Moore, p. 77.

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1. *"Additional duties."* 28 U. S. C. § 636 (b) (Federal Magistrates Act). Mathews v. Weber, p. 261.

2. *"Debts due to the United States."* 31 U. S. C. § 191. United States v. Moore, p. 77.

3. *"Deficiency."* § 6211 (a), Internal Revenue Code of 1954, 26 U. S. C. § 6211 (a). Laing v. United States, p. 161.

4. *"Firearms capable of being concealed on the person."* 18 U. S. C. § 1715. United States v. Powell, p. 87.

WRONGFUL DEATH. See **Conflict of Laws.**

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